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THE LAW REPORTS

1, 2 Exchequer

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THE
LAW REPORTS.

Court of Exchequer.

REPORTED BY
JAMES ANSTIE AND ARTHUR CHARLES,
BARRISTERS-AT-LAW.

EDITED BY
JAMES REDFOORD BULWER, Q.C.

VOL. I.
FROM MICHAELMAS TERM, 1865, TO TRINITY TERM, 1866.
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JUDGES
OF
THE COURT OF EXCHEQUER,
XXIX VICTORIA.

The Right Hon. Sir FREDERICK POLLOCK, Knt., C.B.
Sir SAMUEL MARTIN, Knt.
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
Sir WILLIAM FRY CHANNELL, Knt.
Sir GILLERY PIGOTT, Knt.

ATTORNEY GENERAL.

Sir ROUNDALL PALMER, Knt.

SOLICITOR GENERAL.

Sir ROBERT PORRETT COLLIER, Knt.

ERRATA.

<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
25	note (5)	34 L. J. (Ex.) 13 ..	33 L. J. (Ex.) 13.
39	„ (4)	28 L. J. (C.P.) 84 ..	28 L. J. (C.P.) 81.
39	„ (5)	22 L. J. Ch. 84	22 L. J. Ch. 811.
42	„ (2)	4 E. & B. 666	4 E. & B. 669.
45	„ (2)	4 E. & B. 466	4 E. & B. 669.
46	head note 2 & 3 from top	transpose “latter” and	“former.”
49	note (1)	Cro. Eliz. 131	Cro. Eliz. 113.
65	head note, bottom line..	these	there.
67	note (2)	(2) 34 L. J. (C.P.) 125	(1) 34 L. J. (C.P.) 126.
67	„ (3)	(3)	(2)
139	3 from bottom	defendants to the plain- tiffs	plaintiffs to the defen- dants.
142	8 „ „	note	one.
163	11 from top	<i>Doe v. Prideaux</i> ..	<i>Roe v. Prideaux.</i>
209	20 „ „	their	the.
209	21 „ „	the	their.
248	19 from bottom	defendant's	plaintiff's.
252	2 „ „	3rd of June	30th of December.
253	top line	June	January.

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DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXIX VICTORIA.

QUEENSBURY INDUSTRIAL SOCIETY, LIMITED, *v.* WILLIAM PICKLES
AND OTHERS.

1865
Nov. 3.

Industrial and Provident Society—15 & 16 Vict. c. 31, and 25 & 26 Vict. c. 87,
s. 6—“*Property*”—*Chose in Action*.

The 6th section of the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), provides that “the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society” :—

Held, that a bond given to trustees for an industrial society, registered under 15 & 16 Vict., c. 31, was, by the certificate of registration under 25 & 26 Vict. c. 87, vested in the society; and that the society could sue on it for breaches of the condition subsequent to the registration.

THE declaration stated, that after the passing of the Industrial and Provident Societies Act, 1852, and whilst that act was in force, and before the passing of the Industrial and Provident Societies Act, 1862; and at the time of the execution of the bond thereinafter mentioned, John Anderton, George Crossland, and Joseph Farrell were trustees of a society called the “Queen’s Head

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Industrial Society," the same then being a society duly registered under the first-mentioned act; and that before the registration of the society under the secondly-mentioned act, the defendants executed to the trustees a bond for 100*L.*, dated the 8th of June, 1861, and conditioned to be void if W. Pickles should pay over and account for (as therein mentioned) all moneys, goods, &c., which should come to his hands as salesman of the society; and should save harmless and indemnified the society, its trustees, directors, and members, from and against all loss, &c., which might happen by reason of any act or thing done or omitted by him during his service as salesman of the society. The declaration then averred that the society was afterwards duly registered by its then name of the "Queen's Head Industrial Society, Limited," under the Industrial and Provident Societies Act, 1862, and obtained from the Registrar of Friendly Societies of England his certificate of registration; that it thereupon became a body corporate by the name of the "Queen's Head Industrial Society, Limited;" and that afterwards that name was by due course of law altered to, and the society became incorporated by, the name whereby they sue in this action. "And that at the time of the giving and issuing of the said certificate of registration as aforesaid, the said bond and causes and rights of action were then vested in the said John Anderton, George Crossland, and Joseph Farrell, in trust for the said society, and thereupon all things having happened, &c., the same then became, and still is, vested in the plaintiffs, under and by virtue of and in pursuance of the said Industrial and Provident Societies Act, 1862." The declaration then assigned several breaches by W. Pickles of the above-mentioned duties, subsequent to the incorporation of the society; and averred that, although all conditions precedent had happened to entitle the plaintiffs to be indemnified against the consequent loss, yet they had not been indemnified.

The two sureties, severing in their defence from W. Pickles, pleaded—1. Denial of incorporation; 2. *Non est factum*; 3. That the property in the bond, and right to maintain an action for the causes alleged, did not vest in the plaintiffs as alleged; 4. Denial of the breaches alleged.

Issue was joined on these pleas.

The cause was tried at Leeds, before Mellor, J., at the last Summer Assizes, when the facts alleged in the declaration were proved, and a verdict was entered for the plaintiffs, with leave to the defendants to move to enter a nonsuit, on the ground that the action was not properly brought in the name of the society, and with a provision for a reference, in case the rule should be refused or discharged. It was also agreed that there should be no appeal, and that the point should be argued for the sureties alone, and the principal debtor should be bound by the decision.

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Manisty, Q.C., moved according to the leave reserved. By 25 & 26 Vict. c. 87, s. 6, "the certificate of registration shall vest in the society all the property that may at the time be vested in any person in trust for the society; and all legal proceedings then pending by or against any such trustee or other officer, on account of the society, may be prosecuted by or against the society in its registered name without abatement." The bond being merely a chose in action, is not "property," and, therefore, did not by the registration vest in the company. It was necessary that pending actions should be transferred to the company, because they may relate to property in a strict sense held by trustees for the society, the whole legal interest in which, and, therefore, the right to maintain an action for it, is taken out of the trustees by the statute; and, accordingly, the section provides in terms for this. But there is not the same necessity for transferring mere contracts or causes of action; which the trustees may still sue upon for the benefit of the society. Further, this case is in principle governed by *Linton v. Blakeney Joint Stock Co-operative Industrial Society*, (1) following *Dean v. Mellard*, (2) in which it was decided that a society registered under 25 & 26 Vict. c. 87, cannot be sued on a contract made with their trustees before registration.

POLLOCK, C.B. The question in this case is, whether a provident society, formed under 15 & 16 Vict. c. 31, and incorporated by registration under 25 & 26 Vict. c. 87, can, by virtue of the 6th

(1) 3 H. & C. 853; 34 L. J. (Ex.) 211.

(2) 15 C. B. (N.S.) 19; 32 L. J. (C.P.) 282.

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section of the latter act, sue on a bond given to trustees for it before its incorporation. In the first place, ought the legislature to have contemplated and provided for the transfer of this chose in action? Clearly they ought; if, therefore, there be any mode in which we can be justified in giving the statute that effect, if by any fair and reasonable construction of the words they can be taken to signify that intention, we ought so to construe them. I think that the word *property* may well be understood to mean all rights which the trustees held in trust for the society, whether then existing complete in them, or such as would subsequently accrue by virtue of a then existing title. It was clearly meant entirely to supersede the trustees, and to put the incorporated company in their place, and the words of the statute are, in my opinion, sufficient to effect that intention. Besides this, the objection now made arises on the record, and we are all agreed that we ought not to interfere on this motion, but leave the defendants to their remedy by arrest of judgment.

BRAMWELL, B. This is, to my mind, a very plain case. The contention of the plaintiffs is, that at the time of action, the statute had conferred on them a right of action on a bond given before the statute by the defendants to trustees for the plaintiffs. Mr. Manisty says, that there may be many reasons why the statute should not transfer this right to them, although it transfers to them actions already pending; but I confess I can see none. I can see no reason why the beneficial owner of a *thing* (for I will at present only describe the bond in that way) should not bring an action upon it in his own name. The trustees are mere formal persons having no interest in the bond, and were only a machinery rendered necessary by the previous constitution of the society; that constitution being now abolished, there can be no reason why the formalities belonging to it should be retained.

But it is said we must not go beyond the words of the statute. I agree; but the words say plainly that all property held in trust for the society is to be vested in them; that is, something more is given them than they had before. They had before an equitable interest in this bond, therefore now they have a legal interest in it. Mr. Manisty is therefore driven to contend that a bond cannot be property. Now, *property* is not a term of art, but a common

English word, which must be taken in an ordinary sense, and any ordinary person would certainly think it strange, if he were told that a debt due to him was not part of his property. And this meaning is evidently required by the act, since the contrary construction would be followed by the absurd consequence, that this society, although it could continue actions already pending, yet has no power to initiate proceedings for a similar cause of action.

As to the cases cited, they have no application; if there had been anything in the statute saying that registration should impose on the society obligations formerly due from their officers, the question arising in those cases would have been similar to the present one; but they proceed upon the total absence of any such words in the statute. Here there is no question of imposing obligations on the society, but of vesting rights, for which purpose express words are introduced, and, therefore, the application of the cases cited is not well founded.

But further, I am inclined to think that the point arises on the record; because, if Mr. Manisty's argument is analyzed, it amounts to this: the bond is not property, and, therefore, could not vest by the statute; if this is so, the declaration states that which is erroneous in point of law, and should, therefore, have been demurred to and not traversed. The finding at the trial was right according to the pleadings, and the point can only be raised in arrest of judgment.

CHANNELL, B. If there is any objection here which would avail the defendants, it arises on the record, and ought to be taken advantage of in arrest of judgment. But to decide the case on that formal ground would be too narrow, and I prefer to base my judgment on the merits. The cases which were brought before us, one decided in the Common Pleas, and one in which this court followed that decision, were both cases in which the question was as to the liability of the society to be sued for debts due from their public officer before registration, and it was held that s. 6 of 25 & 26 Vict. c. 87, was not sufficient to subject them to that liability. Now we are dealing with a totally different question, namely, whether that section avails to transfer rights. The old society was not a corporation, and the intervention of trustees was, if not absolutely necessary, at least very useful. But on registra-

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tion under the act of 1862, the society becomes a corporation, and the intervention of trustees being no longer required, it was intended by the act to transfer to the society all their rights. It would be a very limited construction of the words of the act not to read them as meaning to transfer to the society whatever rights were vested in the trustees for their benefit, since the object of the statute is to enable them by being incorporated to dispense with the trustees altogether.

PIGOTT, B. concurred.

Rule refused.

*Nov. *.*

FINNEY v. FORWOOD AND OTHERS

*Interrogatories—Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), s. 51—
 Discovery of Plaintiff's Title.*

The rule allowing, in cases of ejectment, interrogatories inquiring into the plaintiff's title, will not be extended to other actions.

In an action of trover for cotton, the defendant interrogated the plaintiff how and when he first became possessed of the cotton, and when and in whose hands it was when he first became possessed of it. This interrogatory was disallowed.

He also interrogated the plaintiff as to his dealings with the person from whom the defendant had obtained the cotton, but did not show by his affidavit that any such dealings had taken place, or that he had made any inquiries of that person. This was also disallowed.

THIS was an application for leave to administer interrogatories to the plaintiff in an action of trover, brought for 133 bales of cotton. The defendant had pleaded not guilty, and not possessed, and on these pleas issue had been joined.

The affidavit on which the application was made stated the following facts:—

In the month of August, 1865, Messrs. Saunders & Son merchants at Nassau, consigned to the defendants 133 bales of cotton, and accompanied the same with their draft on W. F. Delarue for 2,488*l.* 17*s.* 5*d.*, payable at thirty days after sight.

The defendants duly presented the bill to Delarue, who refused to accept it, and also refused payment on maturity; and the defendants thereupon caused the cotton to be sold in the usual way for the best price. The affidavit further stated, that "it was

not until some time after the said cotton had been sold as aforesaid, that we (the defendants) had any knowledge whatever that the present plaintiff claimed to have any interest in the same, and we are now in entire ignorance in what way or manner he has any right or title thereto, his name not having been used or referred to by Messrs. Saunders & Son on the occasion of their consigning the cotton as before stated."

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The interrogatories, so far as is material, were as follows:—

1. How and when did you become possessed of, or entitled to, the cotton, the subject of this action; and where, and in whose hands was the said cotton when you first became possessed of it?

2. When did you part with the possession of the said cotton, and for what purpose, and under what circumstances, and to whom? Into whose possession did the said cotton come after you parted with it? Did you sell, or pledge, or otherwise deal with the said cotton, and if so, to whom and how?

3. Do you know W. F. Delarue? What is he, and what is his business, and how and where carried on? Have you not had dealings with him, and if so, of what kind? Was not the said cotton in his possession, or in the possession of some persons there on his behalf, at Nassau, in March, 1865, or about that time? How and when did it get into his or their possession, and for what purpose, and with what object? Was it not entrusted to him by you, or by some person who acted by your authority, or derived or claimed title to it from or through you, in order that it might be sent to Liverpool, or to some other port for sale?

4. Has the said W. F. Delarue or any other, and what person or persons, advanced you money upon the security of the said cotton? Were you indebted to him or them whilst the said cotton was in his or their possession, for the money so advanced, and for any other money in respect of which he or they claimed to hold the said cotton?

Martin, B. had refused leave to administer these interrogatories, and this was an appeal from his decision.

Crompton Hutton, in support of the application, contended that it fell within the rule governing discovery in equity, viz., that though one party could not ask the other for his case, yet he

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might ask discovery as to what was the common case of both parties.

[MARTIN, B. Where is there any common case here? The defendant does not suggest that the plaintiff has done anything to establish his case, but claims under some other person who has shipped the goods to him with a bill of lading, and with whom he does not show the plaintiff to have had any dealings. Suppose A buys a horse of B, and C brings an action for the horse against A, can A ask C how and where he got it?]

[CHANNELL B. You must admit an original title in the plaintiff, and then ask what were his dealings with Saunders.]

The interrogatories are directed to discover whether the plaintiff has not so dealt with Saunders or some other persons, as to entitle Saunders to pass the property in these goods.

[MARTIN B. As to that part of the interrogatories, it is not stated that the defendants have made inquiries of Saunders as to where he got the cotton from; if he told them that he had dealings with the plaintiff, who put it into his hands, and that he sold under an express or implied authority from him, they might then interrogate the plaintiff on this. But you lay no basis for your application.]

It is conformable to what has been done in the case of ejectments that these interrogatories should be allowed; in *Flitcroft v. Fletcher* (1), the defendant was allowed to ask in what character, or by what right, the plaintiff claimed possession; and the defendants are here within the reason of the rule, they and their consignors having been in possession since March, 1865.

[POLLOCK, C.B. The case of ejectment has always been regarded as a peculiar one, and we are not disposed to extend the rule.]

[MARTIN, B. In *Flitcroft v. Fletcher* (1), the influence of my Brother Alderson, who had been accustomed to proceedings in equity, led the way to allow such interrogatories in the case of ejectment; but the rule has never been extended to other actions, and in ejectment it is founded on the fact that long possession by the defendant is assailed by a stranger of whose title he is ignorant; as in a late case, where half Wigan was claimed by a person whom

no one had ever heard of.' But even in ejectment such interrogatories are not admitted under other circumstances.] (1)

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Per Curiam. POLLOCK, C.B., and MARTIN, CHANNELL, and
PIGOTT, BB.

Rule refused.

SAVIN v. THE HOYLAKE RAILWAY COMPANY.

Nov. 15.

Private Act—Agreement in derogation of it—Equitable pleading.

A clause in a private Act of Parliament, in terms imposing a duty not relating to the public interest, does not invalidate a previous agreement not to exact its performance, made in view of the passing of the act by the person to whom the duty would otherwise, by the terms of the act, be due, with the persons subjected to it, or with other persons on their behalf.

The plaintiff had agreed with the promoters of a railway bill, to bear the costs of obtaining and passing it. The bill was passed, and contained the usual clause, directing payment by the company of the costs of obtaining and passing it. To an action for his costs, the company pleaded, equitably, the previous agreement:—

Held, a good plea.

Semble that the replication which alleged a rescission of the agreement before breach was bad; but that it would have been good if it had alleged a rescission before work done.

An equitable plea makes the subsequent pleadings equitable, though not so pleaded.

THE declaration stated that, before the passing of the Hoylake Railway Company's Act, the plaintiff bestowed his work and labour, of the value of 5,000*l.*, and expended moneys amounting to 3,000*l.* in and about the applying for, obtaining, and passing of the said act of parliament, and in and about divers other matters and things and expenses preparatory and relating thereto. And that it was in the said act provided, that all costs, charges, and expenses of and incident to the obtaining and passing of the said act, or otherwise in relation thereto, should be paid by the defendants. Averment of the performance of conditions precedent. Breach, non-payment by the defendants.

Second plea, by way of defence on equitable grounds, that before the passing of the said act, the plaintiff was desirous of obtaining the passing of the said act, and of constructing the railway thereby

(1) *Stoate v. Rew*, 14 C. B. (N.S.) 209; 32 L. J. (C. P.) 160, followed by *Pearson v. Turner*, 16 C. B. (N.S.) 157; 33 L. J. (C. P.) 224.

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authorized and empowered to be made, in order that certain other railways in which the plaintiff was then interested, might be connected with the Birkenhead Docks, which connection would be effected by the passing of the said act and the construction of the railway in the first count mentioned. That the plaintiff, before the application to parliament for the said act, and before any part of the plaintiff's claim in that count mentioned was incurred, induced certain other persons to become the promoters of the company by the said act incorporated, and to co-operate with the plaintiff in the applying for and obtaining the passing of the said act, upon the faith of an express agreement between the plaintiff and the said persons, that he, the plaintiff, would bear and pay all the costs, charges, and expenses of applying for and obtaining and passing the said act, and in relation thereto, and that neither the said persons, nor the said company when incorporated, nor any other person, should be liable to the plaintiff for the payment to him of the same or any part thereof.

Demurrer and joinder.

Replication to the second plea: That after the alleged agreement, and before any breach thereof, and before the passing of the said act, the said persons exonerated and discharged the plaintiff from his said agreement, and from the performance thereof.

Further replication to the same plea, that, after the said alleged agreement, and before any breach thereof, and before the passing of the said act, it was agreed by and between the plaintiff and the said persons, that the said contract should be rescinded, and they then rescinded the same accordingly.

Demurrer and joinder.

Littler, in support of the demurrer to the plea, and of the replication. First, this is an attempt by the company to take advantage of an agreement made with third parties, which is against the rule both of law and equity, except under special circumstances. The promoters of the company with whom the alleged agreement was made, are wholly distinct from the incorporated company constituted by act of parliament. *Preston v. The Liverpool, Manchester, and Newcastle-on-Tyne Junction Railway Company*. (1)

(1) 5 H. L. C. 605.

[POLLOCK, C.B. Your argument would shew that no company could take advantage of any agreement made before their incorporation for their benefit. Do you mean to say that if the plaintiff had given the promoters a guarantee to indemnify the company against the payment of these costs, such a guarantee would not be binding, and that a court of equity would not avoid circuity of action by restraining an action for them? It seems to me that the special circumstances, which you say are necessary, exist.]

Secondly, this is an attempt to repeal the act. The act has imposed the burden upon the defendants, and that liability cannot be got rid of by a private agreement. Fraud only can affect the operation of a statute, though private : 5 *Cruise Dig.* p. 23.

[POLLOCK, C.B. A private Act of Parliament is in the nature of an agreement between the parties; why may not an agreement be made in derogation of it, provided the agreement be not (as this is not) inconsistent with the public interest, or morality? Suppose the plaintiff had absolutely released all claim under the act, could he afterwards have recovered?]

[PIGOTT, B. Your argument must go the length of saying that he might recover although he had been paid off.]

The defendants were themselves parties to getting the act passed, and must be taken to have rescinded the agreement, having consented to the insertion of a clause which in terms provided for these costs.

[POLLOCK, C.B. The clause is nothing but the ordinary clause which occurs in every act of this nature. But in truth the contention of the defendants will be that there were never any costs at all. The plaintiff consented to do the work for nothing on account of some private interest he had in the matter, and the clause was not intended to impose on the company a liability to pay what was before no debt.]

[BRAMWELL, B. In fact, it seems that the defence might be raised on a plea of never indebted.]

At least the replication is good.

R. E. Turner was called on to support the demurrer to the replication. The plea shows that the work was so done as not to create any obligation to pay, and the replication saying that the plaintiff

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was exonerated from his agreement to do the work gratuitously, shews no consideration for this new agreement.

[CHANNELL, B. At law it might be necessary to shew a consideration, or a release by deed; but would not the agreement alleged avail the plaintiff in equity?]

This is not pleaded as an equitable replication.

[CHANNELL, B. Every replication to an equitable plea is an equitable replication, and may be supported on any ground that shews an answer to the plea.]

A mere promise to pay cannot constitute a liability either at law or in equity, and, therefore, the rescission of the former agreement after the work was done will not benefit the plaintiff. But there is no averment that the rescission took place before the work was done, but only before breach of agreement, and no other date can be inferred.

[BRAMWELL, B. That seems to be so. You say the act means only that the plaintiff is to be paid for those things which he was by agreement to be paid for, and not for those which he has agreed to do without payment. You admit that if he and the promoters had undone the agreement before the doing of the work, he would have been entitled to be paid, but you say it does not appear that this took place till after the work was done, and it could not then alter the gratuitous character of the service, and you say the replication must show that the work was done on the terms of being paid for it. I do not absolutely say that the replication is bad. Neither do I say that it would be necessary that all the work charged for should be done subsequently to the new agreement. A man may do nine-tenths of a job for nothing, and then finish the other tenth in consideration of being paid for the whole; but it would be prudent to amend.]

Littler, in reply.

Per Curiam. POLLOCK, C.B., and BRAMWELL, CHANNELL, and PIGOTT, BB.

Judgment for the defendant on the demurrer to the plea; and as to the replication, leave to amend.

STUBLEY v. THE LONDON AND NORTH WESTERN RAILWAY
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Nov. 18.*Negligence—Railway—Level crossing.*

There is no general duty on railway companies to place watchmen at public footways crossing the railway on a level; but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company.

A railway was crossed by a public footway on a level, and was protected by gates on each side of the line, and caution boards were placed near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line; but on the level of the line it could be seen for 300 yards each way. A woman approaching the line by that gate was detained by a luggage train on her side, and immediately on its having passed, crossed the line, and was run down and killed by a train coming along the other line of rails. There was no evidence of negligence in the mode of running the trains:—

Held, that there was no evidence of negligence on the part of the company, but that there was evidence of negligence on the part of the deceased.

Bilbee v. The London, Brighton, and South Coast Railway Company, (1) considered.

DECLARATION by the plaintiff, as husband and administrator of Mary Stubley, stating that the defendants' railway crossed a public highway on the level, and that the "defendants did not take reasonable and proper care, or use reasonable and proper means for the protection of persons using the highway, where it was so crossed by the railway;" and that Mary Stubley, whilst lawfully using the highway, was knocked down by the defendants' train, and died from the effects of the injuries. The defendants pleaded Not guilty.

The cause was tried at the Summer Assizes at Leeds before Blackburn, J. It appeared on the evidence that, at the place where the accident happened, the defendants' line was crossed by a public footway on the level. The footway ran between Morley and Batley, and was much frequented owing to the neighbourhood of a mill. Morley lay on the right-hand side of the line going from Dewsbury to Leeds, and Batley on the left-hand. The footpath on each side of the line was protected from it by a swing-gate placed at some distance from the rails. Since the defendants' railway had been constructed, it had been crossed at this place by

(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.

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the Great Northern Railway, which passed over it diagonally by a bridge. At the Batley gate, owing to the obstruction to the view caused by a pier of the bridge, a person standing there could not see a train coming from Leeds for a greater distance than thirty yards along the line; but, by going within about nine feet of the line, he could see 300 yards each way. Caution boards, with "Beware of the Engine" written on them, were placed on each side of the line. About sixty trains usually passed the spot in the course of the day.

On the morning of the 9th of December, 1864, the deceased came from Batley to cross the line to Morley, and was detained by a luggage train which was going from Dewsbury to Leeds, and passing over the footway on her side of the line. As soon as the luggage train had passed, she proceeded to cross the line, but just as she reached the other metals, the express train from Leeds, which she had not observed, came up, and struck her down and killed her.

A man who was coming from the opposite direction, and who was the only witness of the accident, had also been detained by the luggage train at the Morley gate; and his evidence was, that as soon as the luggage train had passed, he saw the deceased coming across, and just stepping on to the rails on his side, and, being able from the Morley gate to see the express train coming, he shouted to her twice and held up his hand; but she, being somewhat deaf, and having her eyes fixed on the rails, neither saw nor heard him.

At the close of the plaintiff's case the counsel for the defendant submitted that there was no evidence to go to the jury; but the plaintiff's counsel having called the attention of the learned judge to the case of *Bilbee v. The London, Brighton, and South Coast Railway Company*, (1) and to the ruling of Pollock, C.B., in the case of *Stapley v. The London, Brighton, and South Coast Railway Company*, (2) the learned judge reserved leave to enter a nonsuit if there was no reasonable evidence to go to the jury; and subject to that leave, he told the jury to assume for the purposes of the day, and only for that purpose, that the law casts upon the company the duty of taking all reasonable

(1) 18 C. B. (N.S.) 584; 34 L. J. (C. P.) 182.

(2) Post, p. 21.

precautions for the purpose of protecting the passengers from risk, including that of keeping a watchman to warn passengers of the approach of a train, if from the nature of the traffic at that place that is a reasonable practice; and he left to the jury the questions—Was there negligence on the part of the company? and could the deceased, with reasonable care on her part, have avoided the accident? Under this direction, the jury found a verdict for the plaintiff; adding that they were of opinion that, at this crossing, there ought to be reasonable precautions taken by the company beyond what they had taken.

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Overend, Q.C., having obtained a rule (1) to show cause “why a nonsuit should not be entered, or a new trial had, on the ground of misdirection by the learned judge in stating to the jury that the railway company was bound to provide other protection to the public than that which it had already provided”—

Manisty, Q.C., and *Kemplay* showed cause.—The company were guilty of negligence. They were bound to have a watchman at the crossing; they are not, by the statutory duty imposed by 8 & 9 Vict. c. 20, s. 61, exempted from the common law duty of taking reasonable care to enable the public to use the highway with safety. A railway differs from an ordinary highway in this, that, in the latter case, passengers crossing it are protected by the duty imposed upon those who run carriages along it to go at a reasonable speed. The legislature, when it authorized railway companies to run trains across a public highway at a level, must have assumed that they would use precautions to protect the public in the use of their pre-existing rights.

[BRAMWELL, B. That is not denied. Mr. Overend admits that if any other precautions than those which were taken were reasonably necessary, they ought to have been taken; but he denies that any others were necessary. What omission do you complain of?]

(1) Upon the argument, some discussion arose as to the form of the rule, and as to whether the defendants were at liberty to make use of the argument of contributory negligence; and it was

ordered that in case of appeal the rule should be amended according to the leave reserved at the trial, and that it should be now argued upon that footing.

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The presence of a watchman would have prevented the accident. The jury have found that some other precautions should have been taken than were taken, and their finding is conclusive, for the case of *Bilbee v. The London, Brighton, and South Coast Railway Company*, (1) shews that if any state of circumstances exists which raises the question whether further precautions ought to be taken, that question cannot be withdrawn from the jury.

[BRAMWELL, B. That case rather seems to decide that it may, under some circumstances, be a question for the jury whether further precautions were necessary, and that, in that case, those peculiar circumstances existed which made it proper to leave that question to them.]

Those circumstances exist here; the effect of the bridge was the same as that of a curve in obstructing the view along the line: *Ford v. The London and South Western Railway Company*. (2)

Overend, Q.C., and *Maule*, in support of the rule.—The case of *Bilbee v. The London, Brighton, and South Coast Railway Company*, (1) turned on the fact that the way was a carriage way. Every person going into a dangerous place is bound to take care of his own safety, and the inutility of the precaution suggested is shewn by the fact that, in this case, a man was actually there who did all that a watchman appointed by the company could have done. The argument of the other side would shew that, not one but, two watchmen should be placed there. The line was visible for 300 yards each way to a person standing on the level of the line, and the accident was entirely due to the carelessness of the deceased in crossing immediately behind the luggage train, without waiting to see whether the other line was clear: *Wilkinson v. Fairrie*. (3)

POLLOCK, C.B. I am of opinion that this rule should be made absolute. I can see no evidence of negligence on the part of the defendants. The railway runs in a straight line for hundreds of yards on either side of the place to which the deceased must come before crossing the line. It is in itself a warning of danger to

(1) 18 C. B. (N.S.) 584; 34 J. L. (C. P.) 182

(2) 2 F. & F. 730.

(3) 1 H. & C. 633; 32 L. J. (Ex.) 73.

those about to go upon it, and cautions them to see whether a train is coming. It is true that a public footway crosses the line on a level, but the legislature saw no mischief in allowing the railway to be constructed thus without requiring the erection of a bridge, and it cannot be said that the defendants were bound to make one of their own accord. Is there anything in the circumstances making it necessary to have a watchman there, or to take further precautions than were taken? I can see nothing, and therefore think that there was no evidence to go to the jury, and that a nonsuit ought to be entered.

BRAMWELL, B. I am very clearly of the same opinion. It is easy to use general expressions about negligence, but this facility makes it convenient to call on counsel, as we did on Mr. Manisty, to point out what in particular the defendants ought to have done in the way of precaution. He says they ought to have had some one there to detain passengers who were about to cross in a dangerous manner; but such a person would have had no power to detain, but only to warn them not to cross. Then is there anything in the actual facts making it reasonable that a man should be placed there for that purpose? It is said that if any one stands at the Batley gate, he cannot see the train until it is within thirty yards of him; but at that point he does not put his foot on the line, but has to go a good deal further to reach the level, and when he is on a level with the line, he can see 300 yards in each direction. Now 300 yards is the sixth of a mile, and a train going at thirty miles an hour would take twenty seconds to pass over this distance. A man walking at a rate of four miles an hour would take three seconds to cross the line; and if we suppose a woman to go at half that pace, she could cross it three and a half times before the train could reach her from the place at which it first came in sight. Need there be any one to warn persons of a train which they can see so far off that, if they only take the trouble to look out for it, it cannot overtake them in crossing? But it is said that the trains are so timed that they meet and pass one another at this point. Can it be said that the defendants must not so arrange them? This is not contended; but Mr. Manisty says that, if they do, they must warn the passengers. Warn them of what? That when a carriage on your own side of

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a road is passed, you will often find on the other side of the road a carriage which has not passed. A policeman then is to be placed there to tell them, not what they do not know, but what from carelessness or heedlessness they forget at the moment when it ought to be remembered. If such a precaution is necessary here, it must also be used elsewhere ; and the argument would shew that on every road, every canal, every railway in the kingdom, means must be taken to warn people against the consequences of their own folly. It would cost too much to provide such a machinery of precaution. But besides this, I look upon all those rules, regulations, and provisions which are made to take care of people when they should take care of themselves as positively mischievous ; and this case is an illustration of what I mean. Mr. Manisty says that the watchman would know the times when trains are to pass ; but are there to be no special trains, no engines travelling backwards and forwards at uncertain times for the purposes of the traffic, which would not be expected, and of which he could give no warning ? A passenger, trusting to his knowledge, would go on, and running into danger, would then turn round and say, "I took no precautions, because I relied on the watchman," and the very means intended to save the passenger from an anticipated danger would lead him to run into one which was not anticipated. I do not go on the ground that a person in the act of crossing the rails and suddenly seeing a train approaching upon him, ought to step back, because persons of ordinarily steady nerves might well be too much stunned to have complete command over themselves at the moment. But I proceed on this, that, in crossing the rails at all, this woman was, as people often do, heedlessly going on at the rear of a passing vehicle on her side, without waiting to see whether the other line was clear.

As to *Bilbeev. The London, Brighton, and South Coast Railway Company*, (1) I need only say, that I do not think we can treat it as an authority in point. I do not mean to say that it was not rightly decided, but that it is no precedent. The Chief Justice, in the beginning of his judgment, guards against the notion of its being an authority for other cases, and bases his decision on the particular circumstances of the case. Now, no doubt, if a railway is so made

(1) 18 C. B. (N. S.) 584 ; 34 L. J. (C. P.) 182.

that a person cannot see an approaching train on account of an abrupt turning or a tunnel, then, on general principles, a peculiar duty of care might be cast on the company; for a passenger may justly say, "I might stay here for ever without being able to tell whether the line is safe;" and that is all that is decided by the case in the Common Pleas. But here it is manifest that if the deceased woman had waited, she would have had ample opportunity to provide against the danger, and had no need to be told of its probability. There is, then, no evidence of negligence on the part of the defendants, but obvious negligence on her part, and the rule must, therefore, be made absolute.

CHANNELL, B. I am also of opinion that this rule should be made absolute to enter a nonsuit. At the trial the learned judge's attention was called to the recent case of *Bilbee v. The London, Brighton, and South Coast Railway*, (1) and my only doubt was whether our decision in favour of the defendants would not clash with that case. But it appears to me that, as my Brother Bramwell has said, the decision does not conclude us, for it does not lay down any distinct rule. The question therefore is,—was there any evidence of negligence for the jury? I do not enter into the question of whether the leave reserved involved the further inquiry as to contributory negligence, because I base my judgment on the ground that there was no evidence to go to the jury of negligence in the company. The learned judge who tried the cause, being pressed by *Bilbee v. The London, Brighton, and South Coast Railway Company*, (1) considered it convenient to leave to the jury the question of whether any further precautions ought to have been taken by the defendants, and directed the jury to assume for the purposes of the day that the law imposed on them the duty of taking precautions, showing a doubt in his own mind, and on receiving the answer of the jury in favour of the plaintiff, reserved the point. Now, looking at the facts of the case, it appears that warning boards were placed on each side of the line. It is not suggested that the train, though an express train, was going at an improper speed. So far there is no evidence of negligence in the defendants, and the only suggestion made is, that they ought to have had a watchman to warn the public of approaching trains. But passengers crossing the rails are

(1) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

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bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended. And this ordinary care would be sufficient to prevent most accidents, and would in this case have prevented the accident; but the deceased forgot to take account of the possibility of the opposite side of the line being occupied by another train, which had been hidden from her by the passing luggage train. As Mr. Overend justly says, the argument of the plaintiff would require not one watchman, but two; for there was here a man on the other side of the line who called out twice to the deceased, and it is difficult to see what more a watchman could have done. The Chief Justice, in his judgment in *Bilbee v. The London, Brighton, and South Coast Railway Company*, (1) says, "I do not mean to lay it down as a rule that they are bound to place guards wherever a footway crosses the line on a level;" and there are not here circumstances of such a kind as to create the necessity which was there shown.

PIGOTT, B. I am of the same opinion. I should be sorry to disturb the verdict, if there were any reasonable evidence of negligence on the part of the defendants; but I can find none. It is suggested that a watchman should have been stationed at the crossing; but what would his duties have been? He could have done no more than was done by the only witness of the accident. I cannot help saying that the deceased stepped into danger in a thoughtless way, and put herself in peril, and took the chance of what might be coming. I do not say that in no case ought railway companies to station watchmen at public crossings of this nature, but such cases must be exceptional; and there would be no limit to their liability if it were left loosely to juries in every case to say whether any further precautions ought to have been taken. I can see no evidence of negligence in the defendants, and therefore agree that the rule must be made absolute.

Rule absolute to enter a nonsuit. (2)

(1) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

(2) See the next case.

STAPLEY AND ANOTHER, EXECUTORS, v. THE LONDON, BRIGHTON,
AND SOUTH COAST RAILWAY COMPANY.

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*Negligence—Railway Company—Level Crossings—Injury to foot-passenger—
Absence of Protection for Carriage Traffic.*

The defendants' railway crossed on a level a public carriage and footway near to the P. station. There were gates across the carriage-way, and a turnstile for the use of foot-passengers. S., a foot-passenger, whilst traversing the railway at the level crossing, was knocked down and killed by one of the defendants' trains. At the time of the accident, contrary to the provisions, by statute and by the defendants' rules, for the safety of carriage-traffic, the gates on one side of the line were partially open, and there was no gate-keeper present to take charge of them; although no traffic was passing across, and although a train was overdue. In an action against the defendants by the executors of S.:

Held, that there was, under the circumstances, evidence of negligence on the part of the defendants to go to the jury, inasmuch as by neglecting the required precautions for the safety of carriage-traffic the defendants might be considered to have intimated that their line might safely be traversed by foot-passengers.

Bilbee v. The London, Brighton and South Coast Railway Company, (1) followed.

THIS was an action for negligence brought against the defendants under the provisions of 9 & 10 Vict. c. 93 by the plaintiffs as executors of John Stapley, deceased.

The declaration stated that the defendants were, at the time of the committing of the grievances thereafter mentioned, possessed of a railway from Brighton to Chichester, and of divers carriages, &c., then used by them for the traffic of goods and passengers over that railway; that the railway crossed a certain highway on a level near the Portslade station, to which station there was an approach from the highway across the railway used by passengers with the defendants' leave; that the defendants were subject to the provisions as to railways crossing highways, contained in or referred to by the 9 & 10 Vict. c. 283 (their special act), and the acts therewith incorporated; yet the defendants so negligently managed their railway and certain gates erected by them, in accordance with the said acts, upon the said highway where it crossed their railway, and omitted to provide proper access to their station, and so negligently managed a certain train upon their railway where it crossed the said highway, that John Stapley, whilst law-

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fully on his way from the said highway across the railway to the Portslade station, was knocked down by the said train, and killed.

The defendants pleaded, first, Not guilty, and, secondly, that the deceased was not lawfully on their railway at the time of the happening of the accident.

At the trial, before Pollock, C.B., at the London sittings after Trinity Term, 1865, the following facts were proved :—

The Portslade station is between Brighton and Chichester, a few miles from Brighton. The line is on an incline towards Chichester, and, crossing the line by a level crossing close to the station, within about a yard of the platform, is a public highway, running north and south. There are swing-gates across the carriage-way, and a swivel gate, or turnstile, at the side for foot-passengers. At a bridge about six hundred yards nearer Brighton than the level crossing there is a curve, from which point the line can be seen by a person at the crossing. Amongst the rules to be observed by the defendants' servants are the following respecting level crossings :—

“219. Unless a written order is given to the contrary, the gates must be kept shut across the carriage-road, except when required to be opened to permit the railway to be crossed.

“220. Whenever it is required to cross the railway, the gate-man must, before opening the gates, satisfy himself that no train or engine is due or in sight; he must then shew his stop signals, which must remain exhibited until the line is clear.”

“225. Gatekeepers must prevent as much as possible any person trespassing on the railway.”

Section 1 of 2 & 3 Vict. c. 45 enacts that “wherever a railroad crosses any turnpike road or any highway or statute labour road for carts or carriages the proprietors or directors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad.”

Section 9 of 5 & 6 Vict. c. 55 enacts that the gates at such crossings shall be kept "constantly closed across each end of such turnpike or other roads," except during the time when horses, cattle, carts, or carriages shall have to cross the railway.

Section 47 of 8 & 9 Vict. c. 20 (The Railway Clauses Consolidation Act, 1845) enacts that "if the railway cross any turnpike road or public carriage road on a level, the company shall erect, and at all times maintain, good and sufficient gates across such road on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross the said railway; and such gates shall be so constructed as, when closed, to fence in the railway; and the person entrusted with the care of such gates shall cause the same to be closed as soon as such horses, &c., shall have passed through the same, under a penalty of 40s. for every default therein."

On the afternoon of the 3rd of January, 1865, the deceased, who had come in the early part of the day by the defendants' railway from Worthing (a station between Portslade and Chichester) to Portslade, was returning to the station by a road which led him to the level crossing upon the north side. An express leaves Brighton daily a few minutes before the train which the deceased was coming to meet. The express does not stop at Portslade. When the deceased reached the railway the express was already overdue some few minutes, but had not passed. The gates on the side on which the deceased was approaching were partly open; on the other side, although not fastened, they were closed. Half an hour before the accident they had been seen closed on both sides. No gatekeeper was on the spot, nor was any one upon the platform of the station, although, generally speaking, an official of the railway company was placed on the platform when trains were expected to pass through. In the present case his absence was accounted for by the fact that the station-master was ill, and the staff of servants was therefore incomplete. The reason assigned for there being no one at the gate was, that the regular gatekeeper, having been killed some time before, his duties were being temporarily per-

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formed by a signalman, who was, at the time of the accident, engaged elsewhere.

The deceased, on arriving at the crossing, walked on to the line either through the open carriage gate or through the turnstile. When he got to the space between the up and down lines he was seen by a porter, who was unloading some trucks at a goods shed, walking, with his head bent towards the ground, in the direction of the station platform, and not directly across towards the gates on the other side. The porter shouted to him to stop, but he continued advancing, and the next instant was knocked down by the express from Brighton. The engine-driver of the train sounded no whistle until the accident was actually taking place. It appeared that the deceased was deaf to some extent, but not so much as to prevent his hearing any loud sound. He was in the habit of using the defendants' railway, and might therefore be taken to be aware of the times at which the various trains ran upon it. The diagonal path he took was a short-cut to the station, and it was not unusual for passengers to make use of it instead of crossing the line directly from side to side, and then walking to the platform.

The learned judge, in summing up, left it to the jury to say whether the accident resulted from any want of care or precaution which the defendants were bound to take for the safety of the public, or whether it resulted from the carelessness of the deceased himself. The jury found a verdict for the plaintiffs.

Bovill, Q.C. (Nov. 6), obtained a rule *nisi* calling on the plaintiffs to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the verdict was against evidence; also on the ground that the deceased had by his own want of care contributed to the accident; and on the ground of misdirection in this, that the learned judge ought to have directed a verdict for the defendants.

Manisty, Q.C., Garth, and Marshall Griffith (Nov. 14) shewed cause. There was evidence of negligence on the part of the company to go to the jury. They have a right by statute to cross highways on level crossings, but they are still bound to take all reasonable precautions to protect the public from injury. Their common law

liability remains, although they have statutory powers: *Vaughan v. The Taff Vale Railway Company*, (1) in the Exchequer Chamber. It is true that the judgment of the Court below was reversed, but the principle there laid down was recognised; *Bilbee v. The London, Brighton, and South Coast Railway Company* (2); *Marfell v. The South Wales Railway Company* (3); *Fawcett v. The York and North Midland Railway Company* (4). Again, their rules are not applicable to carriage traffic only; and even if they were, the company have no right by negligence in respect of their carriage traffic to invite foot-passengers to cross the line. Rule 225, however, applies to every sort of traffic. Here the defendants took no precautions of any kind. The gates were not properly shut, there was no gate-keeper, and no one on the platform of the station.

[CHANNELL, B.—Must not *affirmative* negligence be shewn?]

It is enough to shew the absence of any kind of precaution: *Byrne v. Boadle*; (5) *Scott v. The London Dock Company*. (6) S. C. in the Exchequer Chamber. (7)

[They also contended that the verdict was not against the weight of evidence.]

Bovill, Q.C., Denman, Q.C., and Hannen, in support of the rule. The rules and statutes apply to the case of carriage traffic only. The company are under no obligation, either by statute or common law, to have any one on the platform of the station, nor are they to be obliged always to have a gatekeeper at every crossing. Where a duty is imposed for a particular purpose (as in this case, for the protection of carriage traffic), a neglect in the performance of that duty gives no right of action, except to those who are intended to be benefited. It was the duty of the deceased to have kept a look-out for danger, as he was in a dangerous place: *Wilkinson v. Fairrie*. (8) Foot-passengers crossing a railway must exercise the same caution as in crossing a road; and in order to make the owner of a carriage liable for running over a person

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(1) 3 H. & N. 743; 28 L. J. (Ex.) 41; 5 H. & N. 679; 29 L. J. (Ex.) 247.

(2) 18 C. B. (N.S.) 584; 34 L. J. (C. P.) 182.

(3) 8 C. B. (N. S.) 525; 29 L. J. (C. P.) 315.

(4) 16 Q. B. 610.

(5) 2 H. & C. 722; 34 L. J. (Ex.) 13.

(6) 34 L. J. (Ex.) 17.

(7) 34 L. J. (Ex.) 221.

(8) 1 H. & C. 633; 32 L. J. (Ex.) 73.

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crossing an ordinary road, some *affirmative* act of negligence must be shewn: *Cotton v. Wood*. (1)

[They also contended that the verdict was against the weight of evidence.]

Cur. adv. vult.

Nov. 25. CHANNELL, B., delivered the judgment of himself and PIGOTT, B., as follows:—This was an action tried before the Lord Chief Baron, when a verdict was found for the plaintiff. A new trial was afterwards applied for early in this term, on the ground that the verdict was against the weight of evidence, and on the ground of misdirection. The case was argued before my Lord, and my Brother PIGOTT, and myself. When the arguments closed we took time to consider our judgment, until another case, somewhat similar in its circumstances, had been heard. [*Stubbley v. The London and North Western Railway Company*, ante p. 13.] We are of opinion that the rule should be discharged. On the first point the Court entertain no doubt. They do not consider that the verdict was against the weight of evidence, nor do they think that the deceased was guilty of such contributory negligence as to disentitle the plaintiffs to recover.

But it was also contended that there was no evidence of negligence on the part of the company to go to the jury. We are not, however, of that opinion. The deceased was knocked down and killed by an express train near the Portslade station, near to which the railway intersected a public footway and a public carriage way. On each side of the railway were gates which were not, it seemed, kept fastened. Besides the gates for carriage traffic, there was a swing gate, or turnstile, for foot passengers to pass through, when the carriage gates were shut. The train, on the occasion of the accident, was about four minutes late, and the deceased when he was knocked down was crossing the line towards the platform of the station. It was objected that he was bound, especially as he was deaf, to look whether any train was approaching; that he ought, moreover, to have crossed in a straight line, and not have attempted to approach the platform, and that having done so he was guilty of contributory negligence. But the Court,

(1) 8 C. B. (N. S.) 568; 29 L. J. (C. P.) 333.

as I have said, see no cause to disturb the verdict on that ground.

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At the time of the accident one of the carriage gates was open. It did not exactly appear how the gate came to be open. Half an hour before it was proved to have been shut. Nor does it appear how the deceased got on to the line, whether through the open carriage gate or through the turnstile. Now, upon the part of the company, it was argued that whatever obligations they were under for the protection of carriage traffic, neither the statutes nor the rules applied to the case of foot passengers. But by rules 219 and 220 it is provided that "the gates must be kept shut across the carriage road except when required to be opened to permit the railway to be crossed;" and that before opening them the gateman must satisfy himself that "no train or engine is due or in sight." In this case the gate was open, there was no gateman present, and the train was overdue. Supposing, then, the case had been one of a carriage passenger, there would have been negligence proved against the company. Then, the carriage gate being open, and no gatekeeper present, a foot passenger was invited by that state of things to pass across the line, and the conduct of the company, therefore, was, we think, evidence of negligence to go to the jury. The case depends upon the principle of *Bilbee v. The London, Brighton, and South Coast Railway Company*. (1) We adopt the opinion there expressed by Erle, C.J., that we ought to be careful not to impose any undue burdens on railway companies that are not imposed on them by act of parliament, and we do not say that a railway company must keep servants at every crossing. At the same time, we concur in the view presented to us by Mr. Manisty, that the company are not to be exempt from using due and ordinary care, although their statute gives them the right of crossing public ways on a level. On these grounds the court are of opinion that the Lord Chief Baron could not have withheld the case from the jury.

POLLOCK, C.B. I entirely concur in the opinion of the rest of the Court. I thought at the trial that I could not withhold from the jury what was evidence of negligence against the company in respect of the carriage way. It is admitted that had the deceased

(1) 18 C. B. (N. S.) 584; 34 L. J. (C. P.) 182.

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been a carriage passenger, the plaintiffs would have been entitled to recover, but it is said that the deceased, being a foot passenger, had no right to avail himself of the carriage way. The rules of the company, however, require that there should be a man at the gate at a crossing such as that at which the accident took place. There was, in fact, no man there, for the reasons explained at the trial. Then the deceased, on coming to the spot, and looking around him, might well conclude that no train was expected. It is contended that he was bound, in any event, to have kept a look-out against danger; but the company by their conduct clearly intimated to him that no train was approaching, and it cannot be said that there was no evidence of negligence on their part. The rule must, therefore, be discharged.

Rule discharged. (1)

Nov. 20.

BOULNOIS AND ANOTHER v. MANN.

Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Composition Deed—Unreasonable provisions.

In a trust deed under section 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 104), a provision, which makes the composition payable on the trustees' certificate that the deed has been assented to by the statutory number of creditors, is unreasonable.

To an action for debt the defendant pleaded a composition deed, under section 192 of the Bankruptcy Act, 1861, made between the defendant as debtor of the first part, a surety of the second part, a trustee of the third part, and the several persons who had assented thereto, or whose names and seals were thereunto subscribed and affixed, being respectively creditors, either in their own right, or in copartnership, or attorneys or agents of creditors of the defendant of the fourth part, setting out the deed.

Demurrer and joinder.

The clause of the deed mainly in question was the fourth, which was as follows:—

“As soon as the trustee shall, in writing under his hand, certify that these presents have been executed, or in writing assented to or approved of by a majority in number, representing three-fourths

(1) See the preceding case.

in value of the now existing creditors of the debtor, whose debts respectively amount to 10*l.* and upwards, the debtor shall pay to each of his now existing creditors such a sum of money or composition dividend as shall be equal to the amount of five shillings in the pound upon the whole debt now due to such creditors respectively."

The 10th clause provided that, until the deed should become void under the proviso thereafter contained, the creditors who should be bound by the deed should not (except so far as might be necessary in order to enforce any mortgage, lien, or security, or any rights or remedies against any persons other than the debtor), commence or prosecute any action or suit against the debtor, and that the deed might be pleaded as a release in any such suit or action.

The 12th clause provided that "in case and as soon as the trustee shall at any time hereafter certify, by writing under his hand, that a sufficient proportion, in his judgment, in number and value of the creditors of the debtor has not executed, or in writing assented to or approved of these presents, or the provisions hereof; or in case the debtor shall fail to pay the amounts hereinbefore covenanted to be paid by him, or any, or any one of them, or any part thereof, to the creditors or creditor to whom the same are or is respectively due, upon the same being demanded by such creditors or creditor, then and in either of such cases, these presents and everything herein contained shall, except as to any acts or things theretofore done in pursuance hereof, and without prejudice to any rights of action theretofore accrued hereunder, cease, and be void."

By clause 13 it was declared that the deed was intended to operate as a composition deed, within section 192 of the Bankruptcy Act, and that "if there is anything herein not authorized by the said provisions of the Bankruptcy Act, 1861, to be introduced into a composition deed by a debtor, in conformity with the 192nd section thereof, such unauthorized thing shall be obligatory upon those persons only who, or whose attorneys, partners, or agents, shall have executed or otherwise acceded to these presents, and the respective debts due to, and claims made by them."

Holl, in support of the demurrer. There is no provision for the

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payment of a composition, except that contained in the 4th clause; and that clause is unreasonable, because it makes the payment of the composition dependent on the certificate of the trustees. But the deed binds the creditor (subject only to registration), from the moment that it is in fact assented to by the statutory proportion of creditors. He is therefore bound, and by the 10th clause barred of his right of action, at a time when he has no rights under the deed. And if the trustee should refuse to certify, the creditor can acquire none, without proceeding in Chancery to compel him to do so. The apparent relief from this state of things given by the 12th clause, which makes the deed void if the debtor fails to pay the amount of the composition, is nugatory, because the duty of payment only arises on the certificate of the trustees being given.

[POLLOCK, C. B. The deed binds when the statutory conditions are in fact fulfilled. Is there any provision for the case of the person who has to decide coming to a wrong conclusion?]

There is none.

Harrington, in support of the plea. It must be assumed that the trustee will do his duty.

[POLLOCK, C.B. We must assume nothing either way, but he may not.]

[BRAMWELL, B. Suppose three-fourths of the creditors did not assent, but he certified that they had; or suppose on the other hand, they had assented, but he certified, under the 12th clause, that they had not, what would be the remedy?]

The trustee is only introduced as a machinery for ascertaining the time when the deed becomes valid, and the condition may be rejected as to dissenting creditors, and those only who have assented be held bound, as is provided by the 13th clause. *Hidson v. Barclay*. (1)

[CHANNELL, B. The 4th clause cannot be divided, for if the condition as to the certificate is rejected, there is no time mentioned to which the covenant can apply.]

Holl, in reply.

POLLOCK, C.B. This is a demurrer to a plea setting out a deed

(1) 3 H. & C. 361; 34 L. J. (Ex.) 217.

under the Bankruptcy Act, 1861. In deciding the peculiarly difficult questions which arise under this act, the proper rule to go by is that which has been laid down in the recent cases, that a deed is invalid when it contains unreasonable conditions. The most ordinary form of this is, when all the creditors are not put on the same footing; but that is not the only case. Here the money, which is the composition offered to the creditors, is not to be paid till the assent of the statutory number of creditors is certified by the trustee. This is a perfectly novel provision, and is wholly unwarranted by the act of parliament. It is obvious that it may create great difficulty, for if the certificate is not obtained, the estate cannot be distributed, and what is proposed to be done is not effected. The act intended that when its provisions were in fact complied with, the deed should operate, without the will of any other person intervening, and those who concoct these deeds are not at liberty to require, that when all the statutory conditions are satisfied, something more shall be done before the creditors can obtain any rights by the deed. I think the deed is not within the act, and the demurrer must be allowed.

BRAMWELL, B. I am of the same opinion. Without saying whether this form of clause is convenient or not, or whether it is, or is not a violation of the rule *delegatus non potest delegare*, I think it is unreasonable in point of law. The creditors are not bound by the deed till the event happens which the statute prescribes as the condition of its validity; when that event happens, they are bound; why then is anything further to be done before giving to them such rights as the deed may afford? I cannot see any reason. If they were not to be bound till the giving of the certificate, there might be more necessity for this provision; but the present deed takes away their rights before it confers any new ones upon them. I think the conditions unreasonable, and do not rely upon any presumption as to the trustee performing or not performing his duty.

CHANNELL, B. I agree in thinking that our judgment ought to be for the plaintiff, on the ground stated by my Brother Bramwell. It is not necessary to hold that the provision is inexpedient, or to assume that the trustee will not do his duty; but granting that the provision might be fairly worked out, that discloses no legal

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answer. I take it as a fact that the deed has been executed by three-fourths of the creditors, and I assume, the contrary not being shewn, that the plaintiffs are not executing or assenting parties. It is quite clear that the deed must be supported, if at all, as a composition deed, and there is no provision for the payment of a composition, except that contained in the 4th clause; and therefore if this is struck out, the deed is bad. Now clause 4, if freed from the condition requiring the trustee's certificate of the assent of three-fourths of the creditors, would have been a good and binding contract of composition; but it is clogged and fettered by the introductory words, which make the amount of the composition payable only in the event of the certificate being given; and no time is specified, no event is specified, as that on which the payment is to be due, except the event of the trustee giving his certificate. This is clearly an unreasonable provision. I will say further, that when the statute has carefully prescribed certain conditions for the validity of a deed, such as assent by three-fourths of the creditors, an affidavit of property and debts, and of the necessary assents, registration, and so forth, there can be no reason for adopting any new formality, and it would greatly imperil the safety of any deed to introduce other conditions.

PIGOTT, B. I am of the same opinion, and for the same reasons.

Judgment for the plaintiffs.

Nov. 21.

SUTTON v. THE SOUTH EASTERN RAILWAY COMPANY.

Injunction—Railway Company—Inequality of Charge for “Packed Parcels”—Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), ss. 79, 82.

The plaintiff, a “packed parcel” carrier, having been charged by the defendants, and having paid to them under protest, a sum for the carriage of his packed parcels beyond the sum charged by them to certain wholesale houses for the carriage of goods of a similar description, brought an action against them to recover the amount of the overcharge, and obtained a verdict, which was afterwards upheld in the Exchequer Chamber, upon argument of a bill of exceptions. The defendants continued, however, to make the same charges, and to receive the same sums of money from the plaintiff for the carriage of his goods, as before, and he therefore issued a fresh writ to recover the money paid by him during another and more recent interval of time. After issuing the writ, he applied, under the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 79, 82, for an

injunction to restrain the defendants from charging him for the carriage of his goods "otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances":—

Held, that the case was not one in which the Court would exercise their statutory power to grant an injunction.

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THIS was a rule calling on the defendants to shew cause why a writ of injunction should not issue to restrain them "from charging the plaintiff for the carriage of his goods otherwise than equally with all other persons, and after the same rate in respect of goods of the like description under the like circumstances."

From the affidavits filed in support of the application, the following facts appeared:—The plaintiff is a carrier, having his principal house of business in London, and having subsidiary houses in various towns in England. A very large portion of his business and business connection lies between London and places situated on the lines of the defendants. His chief employment is to collect small parcels from different sources, and after sorting them according to the places to which they are respectively consigned, to make up all those destined for one place into one package under one address, and to forward them as one parcel to his agent at that place. On their arrival they are delivered to his agent as one parcel, which is afterwards unpacked, in order that the contents may be distributed. The trade of collecting small parcels, and making them up into a packed parcel, is well known, and has been followed by the plaintiff for many years. The profit of the trade arises from the fact that by sending a package of more than 112 pounds weight, what are called tonnage rates are charged by the railway company instead of the small-parcel rate, which is higher than the tonnage rate.

There being this difference between the two rates of carriage, the defendants some time since made a regulation, the effect of which was that the plaintiff was charged for all parcels, although over 112 pounds in weight, forwarded by or from him on their lines of railway, a penny per pound avoirdupois by luggage train, irrespective of the contents of such parcels. This charge was not imposed on other persons for the conveyance by luggage train of parcels of precisely the same size and weight over the same number

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of miles, and between the same points of the defendants' lines; but, on the contrary, several wholesale houses which were in the habit of sending packed parcels for their customers by the defendants' lines were charged the ordinary tonnage rates—that is, at a less rate than the plaintiff was being charged for the carriage of goods of a similar description. The defendants, however, denied that they knowingly made any difference between the plaintiff and the wholesale houses. The plaintiff further stated that he had paid large sums of money from time to time, under protest, to the defendants and other railway companies who had followed the defendants' example, and that he had brought several actions against the defendants to recover these alleged overcharges. In one of these, tried before Martin, B., in London, in July, 1864, he produced evidence of the inequality of the defendants' charges, and obtained a verdict, subject to a bill of exceptions, which was afterwards argued in the Exchequer Chamber, where a majority of the court held that the plaintiff was entitled to recover: *Sutton v. The South Eastern Railway Company*; *Sutton v. The Great Western Railway Company*. (1) Notwithstanding this decision, however, the defendants still continued to charge and to receive from the plaintiff the penny per pound avoirdupois complained of, and he therefore issued a fresh writ in August last to recover the overcharges made between the 1st of June and 31st July inclusive, in direct contravention, as was contended by him, of one of their Acts of Parliament (2 Vict. c. 42). The writ was indorsed with notice of his intention to claim an injunction against the continuance or repetition of the injury suffered by him, in the terms above set forth.

Amongst the rules of the defendants, regulating the rate of charge for small parcels not exceeding 112 pounds, is the following:—

“Parcels tied together, or packed in a lump, whether the property of one or more consignees, will be charged at the rate of

(1) 3 H. & C. 800. The same point was, in substance, involved in both cases. *Sutton v. The Great Western Railway Company* alone was argued, it being agreed that the judgment de-

livered in that case should govern the other. An appeal is pending in the House of Lords against the decision of the Court of Exchequer Chamber.

one penny for every pound weight, exclusive of cartage, but not less than the above [separate parcels] rates."

The 2 Vict. c. 42, (an act to amend the acts relating to the South Eastern Railway Company), s. 17, enacts that "the charges by the said recited acts, or either of them authorized to be made for the carriage of any passenger, goods, animals, or other matters or things to be conveyed by the said company, or for the use of any steam power or carriage to be supplied by the said company, shall be at all times charged *equally to all persons*, and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods, animals, or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line; and no reduction or advance in any charge for conveyance by the said company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the said railway."

The 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854), s. 79, enacts that, "In all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought, an action, he may, in like case and manner as hereinbefore provided with respect to mandamus (*vide* ss. 68-77), claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress."

Sec. 82 enacts that, "it shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract, or injury of a like kind arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or a judge upon such terms as to the duration of the writ, keeping an account, giving security, or

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otherwise, as to such court or judge may seem reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the court."

Field, Q.C., Phear, and F. M. White shewed cause. This Court will only grant an injunction in cases where it would be granted by a court of equity, the intention of 17 & 18 Vict. c. 125, s. 79, being to assimilate the remedies at law and in equity. But in such a case as the present a court of equity would decline to interfere. It will only grant injunctions, 1st, in cases of breach of trust; 2ndly, in cases of breach of contract; and, 3rdly, in cases of an infringement of a legal right. The present case falls under none of these heads; certainly not under the first nor the second. But it may be contended that it falls under the third, inasmuch as the plaintiff complains of the infringement of a legal right. Such a right, however, in order that its infringement may be ground of injunction, must be a present subsisting, a continuing, and a special private right. There must also be an injury of some sort to the applicant's property: per Campbell, C., in *The Emperor of Austria v. Day*; (1) and per Turner, L.J., in the same case. The court will not interfere to prevent merely illegal acts. Here there has been no breach of contract, and the acts complained of will not be repetitions or continuances "relating to the same property or right."

[BRAMWELL, B. Is not an injunction sometimes granted by a court of equity in cases of infringement of a trade mark?]

It is, but only on the ground that a trade mark is property: *Hall v. Barrow*; (2) *The Leather Cloth Company v. The American Leather Cloth Company*; (3) and in the present case there is no element of property.

[POLLOCK, C. B. Nor is there any element of continuance. It is not certain that the plaintiff will ever send another parcel by the defendants' line.]

Again, Equity will not grant injunction where there is an adequate legal remedy: *The Attorney-General v. The Sheffield Gas*

(1) 3 De G. F. & J. 217, 232, 239,
 240, 253.

(2) 33 L. J. (Ch.) 204.

(3) 1 Hem. & Mill. 271; 32 L. J.
 (Ch.) 721; S. C. on appeal, 33 L. J. (Ch.)
 199; S. C. in H. of L. 13 W. R. 873.

Consumers' Company. (1) Here the remedy is not inadequate. The plaintiff could maintain an action for the recovery of his money and interest thereon, or he could apply to the Court of Common Pleas under 17 & 18 Vict. c. 31 (The Railway and Canal Traffic Act), s. 3, for an injunction. That act was passed expressly to meet such a case as the plaintiff's.

The Court, at this point of the arguments, called on

J. Brown, Q.C., and Philbrick, in support of the rule. The plaintiff has already brought several actions against the defendants for overcharge, and has recovered in one of them where the court of Exchequer Chamber has decided that his claim is sustainable: *Sutton v. The South Eastern Railway Company*; *Sutton v. The Great Western Railway Company.* (2) That being so, the defendants continue to overcharge him, and he therefore asks now to be protected by injunction from the necessity of bringing a series of fresh actions. There is nothing in the provisions of the 17 & 18 Vict. c. 31, s. 3, to abridge the power of this court. His remedy at law, moreover, is not adequate, for he can only recover the principal sums of money detained from him, with interest from the date of the judgment, but not with interest during the detention.

[POLLOCK, C.B. That may be so if the declaration only contains the common count for money had and received, but not otherwise.]

In *Crouch v. The Great Northern Railway Company* (3) there was a count in tort. In the other cases on this subject, from *Pickford v. The Grand Junction Railway Company*, (4) and *Parker v. The Great Western Railway Company*, (5) down to the present case, the declaration has only contained the common money counts.

[POLLOCK, C.B. In *Crouch v. The Great Northern Railway Company*, (3) the damages claimed were only for loss of business; in the other cases a technical reason prevented the interest from being recoverable. But I have no doubt that upon a count complaining that the defendants refused to deliver the plaintiff's goods to him, and compelled him wrongfully to pay them a certain sum

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(1) 3 De G. M. & G. 304; 22 L. J. (Ch.) 811.

(2) 3 H. & C. 800.

(3) 11 Ex. 742; 25 L. J. (Ex.) 137.

(4) 10 M. & W. 399.

(5) 11 C. B. 545; 21 L. J. (C. P.) 57.

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of money before they would deliver them to him, and claiming damages for being kept out of the use of the money so paid, the interest during the detainer would be recoverable.]

Granting that to be so, still the remedy would be inadequate. Again, the company have violated a legal duty imposed on them by one of their own acts (2 Vict. c. 42, s. 17), whereby it is enacted that the charges for the carriage of goods "shall be at all times charged equally to all persons, and after the same rate per ton per mile in respect of all goods of a like description." The effect of a clause similar to this (5 & 6 Will. IV. c. 107, s. 175) was decided in *Parker v. The Great Western Railway Company* (1) to be that the company may be required to carry as common carriers at the same rate for every customer. That case is confirmed by *Sutton v. The Great Western Railway Company* (2).

[POLLOCK, C.B. Assuming the judges to have rightly decided that the present plaintiff on a particular occasion was overcharged, how do you shew that the defendants will repeat the injury? How do you shew that the plaintiff will ever employ them to carry another parcel? It seems to me that there is nothing here to build your application on; neither a breach of any contract, nor an injury to property.]

It is contended that the case is within the words "other injury," in sect. 79 of the Common Law Procedure Act, 1854, and that it is one in which equity would interfere: *Story's Eq. Jurisprudence*, 6th ed. s. 959 (c). There is as much of a *continuing* element about the injury as in cases of infringement of a trade mark. In *Hodges on Railways*, 3rd ed. p. 751, it is said that "injunctions have issued to restrain a railway company from charging the plaintiff higher rates for the carriage of goods than they charged to other persons for the carriage of like goods under similar circumstances." In *The River Dun Navigation Company v. The North Midland Railway Company* (3), Cottenham, C., states that he concurs with Eldon, C., in holding that the court ought never to be reluctant to exercise its jurisdiction "for the purpose of keeping companies within the powers which the acts give them."

[CHANNELL, B. The writer refers the reader to p. 664, 3rd ed.,

(1) 11 C. B. 545; 21 L. J. C. P. 57.

(2) 3 H. & C. 800.

(3) 1 Railw. Cas. 153.

for the authorities in support of his statement. But on looking at the cases cited there as illustrating his proposition, viz. *Finnie v. The Glasgow Railway Company*, (1) *Attorney-General v. The Birmingham and Derby Junction Railway Company*, (2) and *Branley v. The South Eastern Railway Company*, (3) I do not find them to bear it out.]

The principle now contended for is recognised in all these cases, although in each of them the company were held justified in the charges which they had made. As to the form of the rule for an injunction, it is similar to that in *Baxendale v. Great Western Railway Company*. (4)

POLLOCK, C.B. I believe that we are all of opinion that this rule ought to be discharged. I am clearly of that opinion myself; and I think that we ought to be very cautious in dealing with this power which has been conferred upon us, in cases where there can be no appeal from our decision. We have continually throughout the argument asked for an authority for interference in a similar case. But Mr. Brown has cited none. He has cited what, after all, is merely the written opinion of a learned judge and text writer, and also a variety of cases, in every one of which, however, the injunction asked for was refused. It was refused in the case of *The Attorney-General v. The Sheffield Gas Consumers' Company*; (5) it was refused, too, in the case of *The River Dun Navigation Company v. The North Midland Railway Company*, (6) where Cottenham, C., confirmed the ruling of the Vice-chancellor. There is, therefore, no ground for asking us to grant this injunction, except this, that we are told that it is a case in which we ought to make a precedent. But where, as here, there is no appeal, I think that we ought to act clearly within the limits of our jurisdiction. We sit here, it must be remembered, to administer, not what ought to be, but what is, the law.

Again, if we look into this case, we shall find that it is not true that the plaintiff has no other adequate remedy. He can recover

(1) 15 Ct. Sess. Cas. 523.

(2) 2 Railw. Cas. 124.

(3) 12 C. B. (N. S.) 63; 31 L. J. (C. P.) 286.

(4) 5 C. B. (N. S.) 356; 28 L. J.

(C. P.) 84.

(5) 3 De G. M. & G. 304; 22 L. J.

(Ch.) 84.

(6) 1 Railw. Cas. 153.

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his money back again, and, as I think, can recover it back with interest. The inconvenience, moreover of granting this injunction might be very considerable; and by doing so, we should not effect any advantage to the plaintiff. For if an attachment were to become necessary, in order to enforce our injunction, we should have affidavits from the plaintiff on one side, and from the defendants on the other, stating that our injunction had not or had been complied with. That would be a question we could not try upon affidavits, nor would it, in my opinion, be proper to refer it to the Master, and we should be obliged therefore to direct an issue to be tried before a jury. It is much better that the plaintiff should appeal at once to a jury, directly and not indirectly, for any infringement of his rights which he may have suffered. Under these circumstances, therefore, I am of opinion that we ought to discharge the rule.

BRAMWELL, B. I am entirely of the same opinion. The rule should, I think, be discharged on the grounds mentioned by the Lord Chief Baron. If we grant it, we must affirm a doubtful proposition of law, and must also say whether the facts of this case are within that proposition. And there would be no appeal from our decision. It would be a much better course to apply to a court whence an appeal would lie.

CHANNELL, B. I am of the same opinion. The application is made under section 79 of the Common Law Procedure Act, 1854, which was intended to give the courts of common law an equitable jurisdiction, to save expense. I am not by any means disposed to restrict that jurisdiction, but I do not think it empowers us to comply with Mr. Sutton's demand for an injunction. The section, in my judgment, applies to a class of cases differing from this one. I am rendered the more unwilling to interfere because the Court of Common Pleas, it may be, has larger powers than we have to deal with an application like the present, because the Court of Chancery has jurisdiction over the matter, and because the question of law involved is still *sub judice* in the House of Lords.

PIGOTT, B. I am of the same opinion. The Common Law Procedure Act, 1854, section 79, it seems to me, points to other matters than this. Moreover, the plaintiff has a remedy in the

Court of Common Pleas; and if we were to grant an injunction, there being no appeal from our decision, we might needlessly embarrass a large trade, and do much injustice.

Rule discharged.

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Nov. 22.

Practice—Costs—Error—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

The legal representative of a plaintiff in error (the plaintiff below), coming in by suggestion after the commencement of the proceedings in error, and carrying them on to judgment, under section 163 of the Common Law Procedure Act, 1852, is not, on affirmance of the judgment below, liable to the payment of the costs of the defendant in the court below.

The Common Law Procedure Act, 1852, imposes no new liability to the payment of costs.

THIS was an application for a rule directing the taxing-master to review his taxation.

The action was originally commenced in this Court as an action of ejectment, under the name of *Barrow v. Tootal*. It was afterwards turned into a special case, and on that the Court gave judgment for the defendant. Barrow, the sole plaintiff, then brought error, but died without having done more than enter a suggestion of error on the roll; and the present plaintiff, claiming to be his legal representative, as sole devisee of his real estate, entered a suggestion under section 163 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and continued the proceedings in error. The decision of this Court was affirmed in the Exchequer Chamber, and also on appeal in the House of Lords. (1)

Judgment had been entered in this Court and in the Exchequer Chamber for nominal sums for costs, under an agreement that the taxation should stand over till the final decision of the cause. On the parties applying to have the costs taxed, it was objected before the Master on the part of the plaintiff, that he was liable only for the costs of error, and not for the costs in this Court; and it was arranged that the costs in this Court should be taxed for the defendant *pro formâ*, in order to allow of an application to a judge at chambers for an order to review the taxation. A summons to

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review the taxation was accordingly taken out, and was heard at chambers by Martin, B., who directed that an application should be made to the Court, expressing at the same time an opinion in favour of the plaintiff's contention.

Gray, Q.C., now applied accordingly for a rule directing the Master to review the taxation: It may be taken that Parker is in the same position as if he had originally brought error himself. But he cannot be liable to costs unless the liability is imposed upon him by some statute, and the only statute imposing costs on a plaintiff in error is 8 & 9 Wm. 3, c. 11, s. 2, which subjects the plaintiff below bringing error unsuccessfully to the payment of costs in error. But this does not apply to the costs below, which were included in the judgment of the court below, given in what was, according to the old practice, a different action, and which judgment is affirmed by the Court of Error. According to the law, therefore, as it stood before the Common Law Procedure Act, 1852, a party bringing error on the death of the plaintiff below was never liable to pay the costs incurred in the court below (even if under the statute referred to he was liable for the costs of error, which it seems he was not); those costs must have been recovered against the personal representatives of the deceased plaintiff, by *scire facias* on the original judgment. This state of things was not altered by that act, for although by s. 148 error is made a step in the cause, it has been decided that it was not intended to subject the parties to any new liability, or to alter the law of costs in any way, *Fisher v. Bridges*, (1) *Marshall v. Jackson* (2).

[POLLOCK, C.B. What is the form of the judgment in the Exchequer Chamber affirming the judgment below?]

"That the judgment aforesaid be in all things affirmed, and stand in full force and effect, the said error alleged in any wise notwithstanding;" that is, the judgment below is affirmed, which was a judgment for costs against the plaintiff below, and now avails against his representatives; and since they are bound by it, there can be no reason why the plaintiff in error should be liable also. The judgment further directs that "the said defendant do recover against the said now

(1) 4 E. & B. 666; 24 L. J. (Q.B.) 165.

(2) 4 E. & B. 666 (note).

claimant 400*l.* for his costs of defence in this behalf by the Court of Error now here adjudged to the said defendant;" these words must be confined to the costs in error, if in fact they are the only costs which the court has power to give.

Cleasby, Q.C., shewed cause in the first instance. The whole question turns upon sections 137, 148, and 163 of the Common Law Procedure Act, 1852. The cases cited have no application; in both the attempt was made to upset the rule that no costs are given to either party in the case of a reversal; they negative that inference from the statute, but they decide nothing as to the position of a party succeeding to the place of a deceased plaintiff. Now it is clear that, if the present plaintiff had intervened at any stage of the action before judgment, he would have been liable to the whole costs of the action, s. 137: *Benge v. Swaine*. (1) It is true that there is no specific provision in the sections relating to ejectment, but the rule must be the same as in other actions. If this is so throughout the course of the action below, the rule must be the same where a new party, by intervening in error, puts himself in the position of the former plaintiff; if s. 148 is to be taken in its natural sense, the whole, from the issuing of the writ to the final judgment, is now one proceeding, and the suggestion of the plaintiff's death cannot be taken as a dividing line.

[*POLLOCK, C.B.* On one view of the case it seems reasonable that he should be liable, for he brings error on account of an interest of his affected by the existing judgment, and which he wishes to free from its operation. On the other hand, is it reasonable that he should have to pay costs that have been incurred before his intervention in the suit, and which the defendant is entitled to recover against the personal representatives of the deceased, especially since, if he paid them, he would clearly have no action over for them?]

The court above, reversing the decision of the court below, is bound to give the same judgment as the court below ought to have given; and it accordingly decrees to the successful party the costs in the court below. (2) Suppose the Exchequer Chamber had reversed the judgment of this Court, they could not have

(1) 15 C. B. 784; 23 L. J. (C. P.) 182.

(2) Chitty's Forms (9th ed.), p. 283, and s. 157 of the C. L. P. Act, 1852.

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given costs to the executors of the deceased plaintiff below, for they were not before them.

[CHANNELL, B. Could they have given them to the plaintiff in error, who was no party to the action below, and had not incurred them? And if he could not receive them, why should he pay them? But your main difficulty lies in shewing that the liability to costs in error is altered by the Common Law Procedure Act, 1852, contrary to the doctrine of the cases cited by Mr. Gray. I believe the same doctrine has been held with respect to bail in error under s. 151.]

[Gray, Q.C., referred to *James v. Cochrane*. (1)]

[PIGOTT, B.—The language of section 163 is different from that of s. 137, which provides that the judgment shall be given for or against the person making the suggestion, *as if he were the original plaintiff*.]

The general provision of s. 148 makes any such words unnecessary, and their omission is rather in the defendant's favour.

Gray, Q.C., in reply.

POLLOCK, C.B. I am satisfied that we cannot give costs unless they are expressly given by statute; and as the Common Law Procedure Act, 1852, which is relied on by the defendant, does not do so, we have no power to allow them. It is a serious difficulty in the way of the defendant's claim, that if the present plaintiff paid them, he could not recover them over against the executors of the plaintiff below. Whatever the right of the defendant may be, equitably or morally, we must decide that the present plaintiff, who has made himself a party to the cause in error after the commencement of the proceedings in error, is not legally liable to the costs incurred in the court below.

CHANNELL, B. I am of the same opinion. It is important to bear in mind that there is no right to costs at common law, and that they can only be claimed by a litigant party under some statute. How, then, would the question have stood before the Common Law Procedure Act, 1852? It is clear from *Wms. Saund.* ii. 101 (t), that if the plaintiff in error (the plaintiff below) had died before assigning error, the writ would have abated, and

(1) 9 Ex. 552; 23 L. J. (Ex.) 126.

the defendant must have sued out a *scire facias* against the executors before he could have recovered the costs below. The right, then, to bring error would have been reserved to those who were interested, but the executors only of the deceased plaintiff would have been liable for the costs of the action below. The statute was intended to simplify the proceedings in error, and to diminish their cost, by permitting a party to come in even after verdict and judgment, and pending the error. Now by s. 137 it is clear that if a party had come in by suggestion before verdict and carried on the cause, the proceedings would have gone on as if he had been the original plaintiff, and beyond the change of name, no notice would have been taken that he was not so. Here, however, the new plaintiff came in under s. 163, the words of which are manifestly different from those of s. 137, the words being omitted which provide that judgment shall be given for or against the person so coming in as if he were the original plaintiff, and the section only saying that "the proceedings may thereupon be continued at the suit of, and against such legal representative as the plaintiff in error." The object of this is plainly to prevent the abatement of the proceedings in error, but not to entail any new liability for costs. Two cases were cited, one, *Fisher v. Bridges*, (1) very much in point, the other, *Marshall v. Jackson*, (2) having a strong bearing on the subject, which shew that this was the object of the statute; and the case relating to bail in error, *James v. Cochrane*, (3) is to the same effect. An argument was presented to us by Mr. *Cleasby* accounting for the omission of the words in question on this theory: that since the Common Law Procedure Act, by the 148th section, made the proceeding to error a step in the cause, this had the effect of preventing error from being a new proceeding, and of binding it up with the former part of the cause; so that he would make the omission rather an argument in his favour, or at least not an argument against him. But this is not an inference on which we should be justified in basing a liability to pay costs where none existed before, and the rule must be absolute to review the taxation.

PIGOTT, B. This is not a very satisfactory case to deal with,

(1) 4 E. & B. 666; 24 L. J. (Q. B.) 165. (2) 4 E. & B. 466 (note.)

(3) 9 Ex. 552; 23 L. J. (Ex.) 126.

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because it depends on the nice and difficult construction of the words of an act of parliament. Mr. *Cleasby* says that as error is now a step in the cause, it is so for all purposes; but in *Fisher v. Bridges* (1) it was determined that the statute had no operation as regards the liability for costs. In that case there was a reversal of the judgment below; here it is affirmed; but in substance the cases are the same, and that case was decided on principles that determine the present one. I agree with what my Brother Chancellor has said as to the construction of the sections relied on, that we cannot attach to their provisions the inference of a new liability imposed on the party coming in by suggestion. If the legislature had intended to alter the rule as to costs, and to make the old costs a burden which the new party must assume as the condition of his continuing the proceedings, they would have said so, and not have left us to find out their intention from such obscure indications. I cannot therefore say that the taxation of these costs against the present plaintiff is right, and the rule must be made absolute.

MARTIN, B., concurred.

Rule absolute.

Nov. 25.

SMITH AND ANOTHER v. RIDGWAY.

Will—Construction—Appurtenances.

The testator was seised in fee of two manufactories at H., one on the east and the other on the west side of the High Street. The latter was worth one-half as much as the former. At the time of his death they were, and for thirty years previously had been, jointly occupied and jointly used by his tenants, at a single rent, for the purposes of earthenware manufacture. They were, however, capable of being separately used, if certain alterations were made. By his will, the testator devised all his real estate to trustees for sale, and, by a codicil, his “messuages, manufactory, &c., on the west side of High Street, in the occupation of R. and A. and others, together with all rights and appurtenances to them belonging,” to A. and W. R. and A. were the then occupiers of both the manufactories on the east and west sides:—

Held, that the manufactory on the east side did not pass, under the codicil, to A. and W. as appurtenant to that on the west side; inasmuch as, although they had in fact been used, and rented together for a long period, they were capable of being used separately.

THIS was an action for rent in arrear. The first count of the declaration stated that Joseph Mayer, since deceased, being seised

(1) 4 E. & B. 666; 24 L. J. (Q. B.) 165.

in fee of a certain manufactory, lands, buildings, and premises, and also of a certain other manufactory, &c., demised the same to Leonard James Abington, and the defendant, as tenants from year to year, at the rent of 10*l.* a week, and they thereupon became tenants of the manufactories upon those terms: that Joseph Mayer died on the 28th of June, A.D. 1860, having devised by his last will the first-mentioned manufactory, &c., to the plaintiffs and L. J. Abington, being such tenant as aforesaid, and their heirs: that the defendant and L. J. Abington, under the said demise and will, continued tenants to the plaintiffs in respect of two undivided thirds of the first-mentioned manufactory, &c., and so continued, until and at the time of the accruing due of the rent now sued for, being the sum of 226*l.* 13*s.* 4*d.*, due and owing to the plaintiffs in respect of two-thirds of such portion of the rent as ought to be apportioned to the plaintiffs as to the first manufactory, &c., for 102 weeks, which had elapsed since the death of Joseph Mayer, and before action: that the plaintiffs had performed all things necessary, &c.; yet the defendants did not nor would pay the sum so due as aforesaid. The second count was for money payable for use and occupation of the same premises, and for money due on accounts stated.

The defendant, amongst other pleas, traversed the demise, and the devise of Joseph Mayer alleged in the first count, and also the tenancy of himself and Abington upon the terms therein alleged.

It appeared, upon the trial before Bramwell B., at the Lancashire Summer Assizes, 1865, that the testator, Joseph Mayer, was the owner of two earthenware manufactories in High Street, Hanley, Staffordshire, one on the east side and the other on the west side of the street. From 1830 down to the time of bringing this action they had been used together, at first by the defendant's father, and afterwards, from the year 1848, by the defendant and Leonard James Abington, who occupied the premises jointly as tenants from year to year, paying one rent for the whole, and using them together as partners for the purpose of the manufacture of earthenware. Mayer, by his will, dated the 23rd of April, 1860, devised all his real estate to Abington, Smith, and Goddard the plaintiffs, upon trust for sale, and by a codicil, dated the 26th

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of June following, he made a specific devise to Leonard James Abington and Abner Wedgwood, in the following terms:—

“I give and devise my messuages, cottages, manufactory, and land on the west side of High Street, in Hanley aforesaid, in the occupation of Ridgway and Abington, and others . . . together with the stables, warehouses, out-buildings, yards, gardens, and all other rights, members, and *appurtenances* to the said messuages or tenements, lands and hereditaments, belonging or appertaining, unto my friends, Leonard James Abington and Abner Wedgwood, absolutely as tenants in common.”

At the time of Mayer's death the partnership between Abington and Ridgway, the defendant, was subsisting, but soon afterwards it was dissolved, and the defendant, by arrangement with Abington, continued in sole occupation of the premises on both sides of the High Street. The value of the premises on the west side was one-half more than the value of the premises on the east side. It was proved that, although the two manufactories had long been occupied and used together, they had formerly been and still were, by alterations, capable of being, used separately; but that, during the joint occupation of them, a chimney attached to the manufactory on the east side had fallen into decay, and in consequence the premises on that side could not, without some expense being incurred, be made available separately and alone for the manufacture of earthenware.

The only question between the parties was, whether the action was rightly brought by the plaintiffs, or whether it should have been brought by the devisees under the codicil.

A verdict was entered for the plaintiffs, and leave was reserved to the defendant to move to enter a non-suit, on the ground that by the will and codicil of the testator the property did not vest in the present plaintiffs, and that they were therefore not entitled to maintain the action. It had not been thought proper, assuming that the devisees in trust under the will were the right plaintiffs, to join Abington (see *Badeley v. Vigurs*), (1) in the present action for the proportion of the rent due to the plaintiffs.

Quain (Nov. 2nd) obtained a rule *nisi*, pursuant to the leave reserved, against which

(1) 4 E. & B. 71; 23 L. J. (Q. B.) 377.

Milward, Q.C. and *Baylis* (Nov. 24) shewed cause. The specific devise in the codicil could only pass the manufactory on the west side; and the manufactory on the east side, in respect of which alone rent is sued for, did not pass under the word "appurtenances," or any other of the general words used, inasmuch as it was capable of being separately used, and was in itself worth one-half as much as that on the west side. It therefore passed under the general devise in the will to the present plaintiffs.

W. H. Terrell and *Quain* in support of the rule. The clause in the codicil carries both manufactories. They were used together when the will and codicil were made, and at the testator's death, and had been so used for thirty years. Moreover they could not be used separately without alteration, and without expense being incurred. The manufactory on the east side, therefore, being necessary to the convenient occupation of that on the west, passed as "appurtenant" to it. *Boocher v. Samford*, (1) *Ongley v. Chambers*, (2) *Jarman on Wills*, 3rd Ed. vol. i. p. 742. The words of substantive description in the codicil, it is contended, are "the manufactory, &c., in the occupation of Ridgway, Abington, and others, together with the appurtenances." Now these persons occupied both manufactories, and the words "on the west side of the High Street," must be considered as *falsa demonstratio*. *Griffiths v. Penson*, (3) *Goodtitle v. Southern*. (4) The testator's intention could not have been to pass one manufactory under the general devise for sale, and the other under the codicil, both manufactories having been for so long a period worked, rented, and occupied together.

[*POLLOCK, C.B.* Whatever may have been the intention of the testator as to his estate in these premises, if he uses words incapable of passing them, it must be held that they do not pass.]

The words of description used here are sufficient to give effect to his intention, and they ought not to be restrained by the words of locality.

Cur. adv. vult.

(1) Cro. Eliz. 131.

(2) 1 Bing. 483.

(3) 11 W. R. 313.

(4) 1 M. & S. 299.

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Nov. 25.—The judgment of the Court (Pollock, C. B., and Martin, Channell, and Pigott, BB.) was delivered by

POLLOCK, C. B. In this case, argued before us yesterday, the question was upon the construction of a will. The testator, it appeared, had a manufactory on the west side of a certain street in Hanley, and another manufactory on the east side. The two manufactories were distinct, capable of being separately occupied and separately used. But for many years they had, in point of fact, been occupied together by one person as tenant. During this joint occupation of them, a chimney attached to the manufactory on the east side was suffered to fall into decay, so that the premises on that side could not be any longer used alone as a manufactory. It seems that the manufactory on the east side was one-half of the value of that on the west. That being so, the testator bequeathed to two persons named his “manufactory and land on the west side of High Street, in Hanley, in the occupation of Ridgway and Abington and others, . . . together with the . . . appurtenances” thereunto belonging. Now, there is no necessary connection between the two manufactories, nor are they premises of a similar description to those in the case cited by Mr. Terrell, where certain lands were held to be appurtenant to a rectory (*Ongley v. Chambers*). (1) We are of opinion, therefore—this being not so much a question of “parcel or no parcel,” as of construction—that under the words used nothing passed but the manufactory on the west side of the street; and that unless the adjoining manufactory on the east side, being one-half the value of that on the west side, passes by the word “appurtenances,” the plaintiffs are entitled to recover. But, in our opinion, the manufactory on the east side cannot pass as appurtenant to that on the west. The verdict, therefore, must stand; but as the point was reserved at the trial, the defendant may appeal from our decision.

Rule discharged.

(1) 1 Bing. 483.

BOOTH v. TAYLOR.

Practice—Pleading—Injunction, 17 & 18 Vict. c. 125.-1865
Nov. 25.

A claim of a writ of injunction cannot be pleaded to.

IN this action, the plaintiff as reversioner, sued for damages on account of erections made by the defendant, which caused obstruction to certain ancient lights in the possession of tenants of the plaintiff; and by the endorsement on the writ, and by the declaration, he claimed a writ of injunction, "to restrain the defendant from the continuance and repetition of the injuries above complained of, and the committal of other injuries of a like kind relating to the same right."

The defendant pleaded, fourthly, upon equitable grounds, to the claim for a writ of injunction, "except so far as the same relates to the committal of the other injuries of a like kind relating to the same right," that after the obstructions in question were erected, he demised portions of the premises to tenants, for terms not yet determined, so that he was unable to prevent the continuance and repetition of the injuries mentioned in the declaration, and would be unable to obey the writ, as to the portions of the buildings demised; and the plea stated that he had removed the obstruction, so far as it was caused by the residue of the buildings.

The plaintiff having taken out a summons before Martin, B., at chambers, to shew cause why the plea should not be struck out; the learned judge refused to make the order, but gave leave to appeal, and Barstow having obtained a rule to shew cause, it now came on to be argued.

The only question raised was whether the claim of a writ of injunction in the declaration could be pleaded to, and no point was made as to the validity of the plea, supposing a plea admissible at all.

The following sections of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), were chiefly relied on:—

By section 79 (relating to injunctions), the plaintiff in any action may, "in like case and manner as hereinbefore provided

with respect to mandamus," claim a writ of injunction. By section 80, the writ is to be indorsed with a notice that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.

By section 81, "The proceedings in such action shall be the same as nearly as may be and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action, judgment may be given that the writ of injunction do or do not issue, as justice may require."

By section 82, the plaintiff may "at any time after the commencement of the action, and whether before or after judgment," apply *ex parte* to the court or a judge for a writ of injunction.

By section 68 (relating to mandamus), the plaintiff may indorse on the writ and copy to be served, a notice that he intends to claim a writ of mandamus, and may thereupon claim the mandamus in the declaration. By section 70, the proceedings in a mandamus action are to be the same as in an ordinary action for the recovery of damages; and by section 71 "In case judgment shall be given to the plaintiff that a writ of mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, beside issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced."

Kemplay shewed cause, and cited *Bilke v. The London, Chatham, and Dover Railway Company*, (1) in which it was held that a demurrer to such a claim might under some circumstances be good; and contended that if the matter was capable of being dealt with by demurrer, it must also be capable of being dealt with by plea; it must be allowable to state, in a plea, those circumstances which, if they appeared in the declaration, would make it demurrable as to the claim for an injunction.

[CHANNEIL, B. The case cited only goes to this extent, that there is a certain class of cases which are fit for the issuing of an

injunction, and that if the declaration does not shew such a case the claim of a writ is plainly bad and informal. But supposing the judgment to go for the writ, how are you injured? It cannot be enforced except by applying to the court by motion on affidavits, to issue the writ, and then you can state whatever reasons you have to shew why it should not issue.]

But here facts are shewn which negative the right of an injunction altogether, and prevent the judgment from being given.

[POLLOCK, C. B. In every case when *primâ facie* an injunction ought to go, there may be circumstances making it improper that it should go, and those circumstances vary from time to time, and, if they exist when the writ is asked for, will form an answer to the application. It is not to be assumed that judgment for the injunction will follow as a matter of course upon the judgment for damages and costs; the 81st section says the "judgment may be given that the writ of injunction do or do not issue as justice may require."]

It may be important to displace the plaintiff's right to ask for an *ex parte* injunction under section 82.

Barstow, in support of the rule, was stopped.

POLLOCK, C. B. My view of the statute is that the claim for a writ of injunction which is made by the writ and in the declaration, is merely a preliminary formality to enable the plaintiff to ask for an injunction at the proper time; and, until he does so ask, no judgment for an injunction can be given; for the successful plaintiff is not entitled to it as a matter of course. The plea is therefore not called for, and must be struck out.

BRAMWELL, B. I quite agree, and certainly do not think that anything that was said in the case cited by Mr. Kemplay will assist him.

CHANNELL, B. I am of the same opinion. If the effect of this decision were to deprive the defendant of his right to use any defence which he has against the claim of an injunction, I should think otherwise; but in truth the reason why it is not matter for a plea is, that in the present state of the action the question has not arisen, and it may never arise. The proceedings in the action are entirely divisible, but in order to entitle the plaintiff to apply for

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an injunction he must give notice of his intention by incorporating his claim in the writ and declaration.

PIGOTT, B. I am of the same opinion. To allow such a plea would open the door to raising expensive issues of fact on a matter that may never require to be decided.

Rule absolute.

Nov. 25.

IN RE THE SHEFFIELD WATERWORKS ACT, 1864.

COLLIS' CLAIM.

WRAITHBY'S CLAIM.

Costs (taxation of)—Officers of Court.

In a private Act, constituting a body of commissioners for settling claims against a company, it was provided that they might give certificates for costs, and that in case of difference such costs should, on the application of either party, be "taxed and settled by a Master of a Superior Court of Law at Westminster," according to the rules, and on payment of the fees observed and paid in actions at law, and that, on production of the certificate, judgment for the amount might be entered up and execution issued thereon. A master of this Court having taxed costs accordingly:—

Held, that, under this provision, the masters taxed as *personæ designatæ*, and not as officers of the Court, and that the Court had no jurisdiction to review their taxation.

THESE were rules calling on the claimants in the respective cases to shew cause why the Master should not review his taxation.

The cases arose under the Act passed to provide for the assessment of compensation claimed against the *Sheffield Waterworks Company* for damage caused by the bursting of their reservoir in March, 1864. The Act (27 & 28 Vict. c. 324), passed 29th July, 1864, appointed a body of commissioners (s. 6), to whom all claims against the company were to be referred, the company admitting negligence (ss. 40, 41, 87, 88.) The claims were to be determined by them within nine months after the passing of the act (s. 58); and within one month after the expiration of that period, they were to make a general certificate of damages (s. 59), which was to be deposited with the town-clerk of Sheffield (s. 62). Their proceedings and acts were not to be liable to be interfered with by any court of law or equity, by way of certiorari, prohibition, or injunction; and their general certificate was to be evidence

of the right to the damages specified therein, and to be unimpeachable on any account whatever (s. 60). The commissioners and their clerk were to continue to act for three months after making their certificate, and their powers were then to cease (s. 64). The company was to pay the amounts certified within three months after the making of the certificate, with interest from the date of determination, after which time the general certificate was, as to the several amounts of damages certified and interest, to have the effect of judgments recovered in one of the superior courts of law at Westminster and registered (s. 65); with power, in case of non-payment, to enter up judgment and issue execution, on the production of a certified extract from the general certificate (s. 69).

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By s. 66, the mode in which the cost of proceedings relative to claims were to be borne and paid was regulated, and by s. 67, such costs were to be due and payable at the expiration of six months after the making of the general certificate, "provided that all such costs shall, in case of difference, be taxed and settled on production of a certificate of the commissioners, by a master of a superior court of law at Westminster (on the principle and according to the rules and on payment of the fees observed and paid on the taxation and settlement of costs in actions at law), if application for such taxation and settlement is made by either party within the last-mentioned period of six months; but in case of difference, any such costs shall not be payable at any time unless they are so taxed and settled." On non-payment of costs payable under the act, within twenty-eight days after a demand in writing, the certificate of the commissioners was to have the effect of a judgment, under provisions similar to those relating to the certificate for damages (s. 68), and with a similar power of entering up judgment and issuing execution (s. 70).

The claims had been adjusted, and the certificate made out and sealed, and the powers of the commissioners had ceased. The claimants, whose names appeared in the general certificate, had also obtained certificates for costs, and their bills of costs had been taxed by one of the masters of this Court on the application of the company; but the company being dissatisfied with the taxation, *Pickering, Q.C.*, had in this term obtained these rules on their behalf.

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Manisty, Q.C. and *Shepherd* shewed cause. The whole matter is alien from the jurisdiction of this Court, and the purpose of the act is to make every decision in the first instance final. *In re Ross v. The York, Newcastle, and Berwick Railway Company*, (1) a similar question arose under s. 52 of the Lands Clauses Consolidation Act, 1845, and the decision supports this view.

The Court then called upon

Pickering, Q.C., *Mellish, Q.C.*, and *Quain*, to support the rules. It was evidently intended, by referring the costs to the masters of the courts, to put parties under the protection of the court. The present case differs in this respect from the one cited; for there it was not an officer of the court whose decision was appealed against. Here, on the contrary, the costs are referred to the officers of the court, who are directed to tax them according to the ordinary rules of taxation, and of these rules the court is guardian.

[POLLOCK, C.B. If costs are given on a rule, they are included in the rule; if in an action, they are included in the judgment. But we do not give any costs here, but they become due by the commissioners' certificate. We know our own proceedings; but what means have we of knowing what takes place before the commissioners?]

A decision against us will place the decision in the hands of each master separately, without providing any means of bringing their rules of taxation into conformity with one another. Either party may apply for taxation, and (if both do not apply simultaneously to different masters, which raises another difficulty) the party applying will select the master whose views are known to be most favourable; or if they cannot select the master, but only the court, and must take the master in the ordinary rotation, this shews that the masters tax as officers of the court. If, again, the masters tax as private individuals, they, and not the Treasury, will be entitled to the fees, which will be an unexpected, though not a disagreeable, result to them. It will be difficult to describe the nature of their jurisdiction. If it is an award, we can only review it by making it a rule of court and moving to set it aside; and if a master on being applied to refuses to tax, we can only compel him to do so by a mandamus from the court of Queen's Bench.

(1) 5 Rail. Ca. 516; 5 D. & L. 695.

POLLOCK, C.B. This rule must be discharged. I do not say the taxing master's decision is an award. He is a person appointed by the legislature to perform a certain duty, and rather resembles an appraiser called in by the parties to settle a claim. But whatever his precise character may be, we cannot interfere with his decision. It appears to me that if the legislature had intended that we should review this taxation of costs, incurred in a matter wholly without our jurisdiction, they would have said so expressly, and we should probably have received some previous intimation from the Government of what was intended, and an inquiry whether we had leisure to discharge the duty, as is usually the case when new duties are imposed upon the judges. There is no such direction in the act, and we cannot, therefore, interfere.

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BRAMWELL, B. I am very clearly of the same opinion. It lies on those who invoke the exercise of our jurisdiction to shew that we possess it, and this they have failed to shew. In the ordinary cases of a rule or action the court in its judgment awards the costs, and its officers are directed to ascertain the amount; from their decision an appeal lies to the court, because it was the judgment of the court which awarded the costs in the first instance. But here there is no judgment or award of the court, and, therefore, no foundation for the appellate jurisdiction. Another reason against the application is, that by s. 67, the costs are, in case of difference, to be taxed and settled, not by the master of any particular court, but by "a master of a superior court of law at Westminster." You might go to any court you please, and the masters there might say, "We are too much engaged with our regular duties; we have no time to attend to the matter; go elsewhere;" and a master so refusing to tax would not incur any legal consequences; he would not be liable to an indictment for not performing a statutory duty. The parties, then, are at liberty to go to any one of the masters. The masters are merely twelve designated persons, not acting as officers of any court, and we have no more jurisdiction to entertain an appeal from a master of this court than from a master of the Queen's Bench.

CHANNELL and PIGOTT, BB., concurred.

Rules discharged.

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Nov. 13.

STANGER v. MILLER.

Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—Composition Deed—Registration.

A composition deed under the Bankruptcy Act, 1861, so far as its operation depends on the act, takes effect, for all purposes, from the date of registration, not of execution:—

Held, therefore, that rent, which accrued due from the insolvent to the defendant after the execution but before the registration of a trust deed, might be set off in an action, brought against the defendant by the trustees for a debt due from him to the insolvent.

Held, also, that the proportion of rent which, under section 150 of the Bankruptcy Act, 1861, would be proveable in bankruptcy, may be set off as a mutual credit, under section 171 of 12 & 13 Vict. c. 106, in an action brought against the landlord by assignees in bankruptcy or trustees of a composition deed.

Semble, by *Bramwell, B.*, that the liability to the rent was a liability to pay money on a contingency within section 178 of 12 & 13 Vict. c. 106, and as such a subject of set-off.

THIS was an action brought by the plaintiffs as trustees of a trust deed, executed by one John Bowles, under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134; and the 5th count of the declaration was for money due from the defendant to Bowles, at the time of executing the trust deed, for goods bargained and sold, goods sold and delivered and on accounts stated.

To this count the defendant pleaded on equitable grounds, as to 37*l.* 10*s.*, parcel of the money claimed, that Bowles was his tenant, and that a quarter's rent amounting to that sum became due on the 24th of December, 1864; and that "the said John Bowles, before and at the time of the registration of the said deed or instrument in the declaration mentioned, and before the defendant had any notice or knowledge of the said deed or instrument, or of any act of bankruptcy committed by the said John Bowles, and until and at the commencement of this suit, was and still is indebted to the defendant in an amount equal to that part of the plaintiff's claim to which this plea is pleaded, for the said quarter's rent which became due and payable as aforesaid on the said 24th December, 1864, which amount the defendant is willing to set off against that part of the plaintiff's claim to which this plea is pleaded."

Demurrer and joinder.

Patchett, in support of the demurrer. The set-off is claimed in respect of rent which became due before the registration of the deed, but, as it must be assumed on the pleadings, after its execution. First, the date of execution is the date which fixes the rights of all parties, the effect of the registration relating back to that time. If the opposite view is adopted, it gives an opportunity for defrauding both the former creditors, who assented to the deed on a view of the existing debts and assets and who may find new debts added, and also other persons, who between execution and registration may, in ignorance of it, have given credit to the debtor *bonâ fide*, and then find that they are already bound by the deed. In *Symons v. George*, (1) there is a dictum by Crompton, J., in favour of this view.

[CHANNELL, B. That case turned entirely on the passing of the property comprised in the deed by its operation at common law.]

It will follow, then, that the debtor may, between execution and registration, acquire property on credit, which he will hold for himself, free from any liability; since the vendor's claim will be barred by the deed, and at the same time, the property not passing by the deed, neither the vendor nor any of the other creditors can derive any benefit from it as assets. Secondly, assuming that the date of execution is to be taken, there was no debt then due to the defendant, and there can therefore be no set-off. The rights of the insolvent vested in the trustees of the deed, as from the date of its execution, by virtue of the subsequent registration under the act, but the debt which accrued afterwards was due, not from the trustees, but from the insolvent; the debts are not therefore between the same parties, and cannot be set off against one another, *Isberg v. Bowden* (2).

[BRAMWELL, B. If that case were applicable here, it would prove that there never could be a set-off between the trustees and the debtor of the insolvent, which is clearly otherwise. But further, the trustees must stand in the same position as assignees in bankruptcy, and as against them, would there not be a good mutual credit under the bankruptcy acts?]

(1) 34 L. J. (Ex.) 187.

(2) 8 Ex. 852, 858; 22 L. J. (Ex.) 322.

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There could be no mutual credit under 12 and 13 Vict. c. 106, s. 171, because there is no "debt or demand" until the day on which the rent is made payable; for it is not a claim accruing *de die in diem*, but the whole becomes due at once, on the arrival of the appointed day. It has never been attempted to apply this term to a debt arising on the demise of land; nor is the aid of the section required, for the landlord has his remedy by distress. The Bankruptcy Act, 1861, s. 150, admits him to prove for a proportional part up to the day of adjudication, and if his rights here are the same, he can claim, but only for rent up to the date of the deed; but he could not in either case plead this as a set-off, for the exception introduced by that clause in his favour must be limited to the express provisions of the act. The introduction of this provision, however, shows that the case was not included in the previous act.

[CHANNEL, B. The defendant may very well be said to have credited the insolvent with the use of the house, and this would be a credit ending in a debt, and so within the cases on mutual credit; and the provision of the act of 1861 is not superfluous, because the earlier statute only gave a right of set-off, not of proof.]

Keane, Q.C., in support of the plea. The rights of the defendant must be the same as if the debtor had become bankrupt; by s. 197 of the Bankruptcy Act, 1861, it is provided that the court of bankruptcy shall have jurisdiction over trust deeds, and that, "except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed, according to the law and practice in bankruptcy, so far as they may be applicable." It is clear, therefore, that, taking advantage of the 150th section, the defendant might have proved for the proportion of rent up to the day of execution; he might therefore have set off that amount, and paid money into court for the residue. But the real question is, whether it is the date of the execution or of the registration of the deed which determines the rights of the parties. The defendant contends that it is the official date; that of which a memorandum is by s. 196 to be written by the registrar on the face of the deed, at the time of the registration. Until that time, the deed was inoperative, and the trustees could not have sued

for debt; but if the insolvent had sued, and the defendant had pleaded a set-off of this debt, the insolvent could not have replied that he was suing on behalf of the trustees, for, as the plea states, the defendant had no notice of the assignment of the debt. *Buck v. Lee*. (1) If the opposite proposition were correct it would lead to great inconveniences; for if where a deed assigns debts, as here, the force of the statute transfers them to the trustees as from the date of the execution, what is the position of a person *bonâ fide* paying a debt to the insolvent between the two dates? The execution is a fact of which no one has notice, and which is entirely the act of the insolvent, and it would be unreasonable to suppose that this should be the event by reference to which rights should be fixed under a deed, that might not be registered, and therefore not become operative, for twenty-eight days, or "such further time as the Court in London shall, under s. 194, allow." He also referred to *ex parte Harrison re Lawford*, (2) and s. 199 of the Bankruptcy Act, 1861.

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Patchett, in reply. The rights of the trustees under the deed take effect immediately on its execution, and they might bring an action before registration.

[POLLOCK, C.B. Can you produce any instance in which the court has upheld the acts of trustees done before registration? No doubt where property is transferred by the deed they might recover possession of it in an action, because, as in *Symons v. George*, (3) the property would pass by the deed at common law; but it is a mistake to suppose that it would avail to transfer debts before registration.]

Under s. 194, the effect of non-registration is confined to making the deed inadmissible in evidence, and a plea of non-registration would not be a good plea.

[POLLOCK, C.B. No; because registration would be part of the plaintiff's case, and he must prove it. But when s. 194 says that, in default of registration the deed shall not be receivable in evidence, it does not exhaust the whole effects of non-registration; s. 197 says that "from and after registration," certain things shall happen, which implies that until registration those things do not happen.]

(1) 1 Ad. & E. 804. (2) 26 L. J. (Bkcy.) 30. (3) 34 L. J. (Ex.) 187.

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He also referred to the 7th condition of s. 192 of the Bankruptcy Act, 1861, providing for delivery of possession to the trustees immediately upon the execution of the deed.

POLLOCK, C.B. We are all of opinion that this plea is good. This is a claim by trustees of a deed under the Bankruptcy Act, 1861, for a debt due to the insolvent; which is a right that does not pass by the execution of the deed, but vests only on registration under an act of parliament, the provisions of which then give to the deed the effect of an adjudication in bankruptcy. The defendant pleads a set-off for rent, and it is objected that the rent under the demise did not become due till after the execution of the deed, and that that date is to be taken as corresponding to the adjudication in bankruptcy. But, as I think, registration is to be taken as the event which fixes the rights of the parties, and the date of registration as the time corresponding to the adjudication in bankruptcy. On that footing, there would be no doubt that this rent which accrued due before registration, is a good set-off, but even if the date of execution were taken, the claim would still be maintainable. The 150th section of the act of 1861 gives the landlord power to prove under a bankruptcy for the proportion of rent due up to the moment of adjudication, and thus, in effect, provides that his rights shall be the same as if the rent accrued from day to day. Now a deed under the act of 1861, has, when registered, the operation of an adjudication in bankruptcy, and therefore the landlord has, under this deed a proveable claim against the trustees, which he may therefore set off in an action brought against him by them.

BRAMWELL, B. I think the plea is quite right. The proper way to consider the question is to see how the matter would stand, if, instead of a deed, there had been an adjudication in bankruptcy, I will assume for the present the date of execution to be the period corresponding to that event. Even then this would, I think, have been a good plea of mutual credit under the bankruptcy acts, although not a good set off within 2 Geo. 2, c. 22. Speaking generally, the effect of s. 171 of the act of 1849 relating to mutual debts and credits is, that whatever can be proved in bankruptcy, can also be set off in an action brought by the assignees against the creditor. Now it is plain that, under

s. 150 of the act of 1861, the defendant could have proved for the proportion of rent up to the day of adjudication. But, further, since under the contract of demise the rent would become due after the bankruptcy, if the estate continued, though not payable at that time, I think that, although not a debt payable on a contingency under s. 177 of 12 & 13 Vict. c. 106, it might be a liability to pay money on a contingency within s. 178 of the same statute. In either case, it would have been a mutual credit, and therefore a subject of set-off in bankruptcy; but if so, it is clear that it is a subject of set-off here, for the trustees cannot be in a better position than if they had been assignees in bankruptcy. Therefore, whether you take the date of the execution of the deed, or that of its registration, as the point of time answering to an adjudication, the defendant is entitled to succeed, if this view is correct.

But he is also entitled to succeed on the ground stated in the argument, that we are to look at the registration as the date with reference to which everything is to be considered; although, as in every other question arising under this act, difficulties occur in this construction. The 194th section applies to all deeds executed by a person not a bankrupt, for the benefit of his creditors, or for his own discharge from liability, and they are all to be registered within twenty-eight days after their execution by the debtor; and by s. 197, the provisions of bankruptcy then come into operation. We must read this section as applicable as well to deeds binding those who are parties to them, as to those which bind other persons not parties. Now it is impossible to say that a deed executed on a given day, not announced to the world, but kept in the debtor's pocket, should, on being registered, have a retrospective effect given to it, carrying back its operation twenty-eight days, or for such further time as the Court of Bankruptcy may, under s. 194, allow for its registration. The deed becomes an official document at the time when it has an official sanction given to it by registration, and this is the point of time which we are to consider as that which fixes the rights of the parties concerned. The defendant therefore, having a debt which had already become due before the date of the registration, had a debt which is a subject of set-off as a mutual debt.

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CHANNELL, B. I also think the plea is good, and that our judgment must be for the defendant. The trustees are in the same position as assignees in bankruptcy, and under the plea the defendant must succeed, if he shows a mutual credit. Now here, at the execution of the deed, a portion of the rent was payable though only by virtue of the statute, which assimilates the demand to one accruing *de die in diem* for the purpose of proof against a bankrupt estate. This therefore was a proveable demand, and therefore a good set-off under this equitable plea. But also, what is now set-off was, by the terms of the demise, not only due by the contract, but was actually payable in point of time before the date of registration. Either, therefore, as a mutual debt or a mutual credit, the plea shows a good answer; but I am of opinion that there was an actual debt to be set off, for I consider registration to be the dividing line. We were referred to the 7th condition of s. 192, as opposed to this interpretation; but I do not so understand it, for, consistently with it, that condition has its proper effect. The statute makes a clear distinction between execution and registration; it is registration which gives effect to the deed by making the rights and proceedings under it similar to those in bankruptcy; but, for some purposes, the deed may have effect from the date of execution, so as to enable the trustees to take possession of the property comprised in it; and this purpose is served by the clause of the act referred to. Nor have the concluding words of s. 194, relating to evidence, the effect which Mr. Patchett ascribes to them. The deed must be given in evidence by the trustees to maintain their rights, and this provision, to secure registration and to protect against the use of an invalid deed, cannot prove that the deed has validity for other purposes before registration. The case seems to me a tolerably clear one, and I entertain no doubt that our judgment should be for the defendant.

PIGOTT, B., concurred, for the reasons given by the rest of the Court.

Judgment for the defendant.

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Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—Deed under Section 192—Unreasonable conditions—Reservation of rights against Sureties—Release—Delivery of possession.

A deed under Section 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), is valid, 1. although it unconditionally releases the debtor, in consideration only of a covenant to pay a composition partly secured by suretyship, and of the assignment of property next mentioned; 2. although it contains an assignment of the debtor's property, coupled with a condition that the debtor shall remain in possession with the power of disposing of the property, until default is made in payment of the composition; 3. although it has no clause reserving rights against sureties, unless it is shewn that these are creditors secured by sureties.

DECLARATION for goods bargained and sold, goods sold and delivered, and money due on accounts stated.

Plea by way of equitable defence, that the defendant was indebted to the plaintiff and divers other persons, and that, "after the commencement of this suit, and when the defendant was indebted as aforesaid," he executed a deed under the Bankruptcy Act, 1861.

The plea set out the deed, which was made between the debtor of the first part; E. W. Genever, a trustee, of the second part; and all the creditors of the defendant of the third part; and by it the defendant covenanted with the trustees, and with all his creditors, that he would pay to all his creditors a composition of 5s. in the pound upon their several and respective debts, "in the proportions, at the times, and in manner hereinafter mentioned, that is to say, 2s. 6d. upon or immediately after the day of the date of the registration of these presents, and the remaining 2s. 6d. in the pound at the expiration of three calendar months from the time of such registration as aforesaid; the last of such instalments to be secured by the promissory note of the debtor and of Henry Barratt, bearing date, and to be delivered to the said creditors, on the day of the date of the registration hereof." The debtor also conveyed and assigned all his estate real and personal to the trustees absolutely; "provided, nevertheless, that until default shall be made in payment of the said composition, or either of the instalments thereof, in pursuance of the covenant of the debtor hereinbefore contained, it shall be lawful for the said debtor, his executors, administra-

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tors, and assigns, to hold and peaceably enjoy the real and personal estate and effects hereby conveyed and assigned, or intended so to be, and to use and deal with the same, and also to carry on his trade as a tailor and draper, without any interruption or disturbance of or from the said E. W. Genever, or by any of his creditors;" but an inventory of the estate and effects of the debtor at the time of the execution of the deed was to be taken by the trustee, who was also to be at liberty, during the continuance of the deed, to enter the debtor's premises, and inspect his effects, and report to the creditors; and in case default should be made in payment of the composition, or either of the instalments, it should be lawful for the trustee to apply and administer the debtor's estate and effects for the benefit of the creditors, in like manner as if the debtor had been duly adjudged bankrupt. And, "in consideration of the covenant and assignment hereby made by the debtor as aforesaid," the creditors released the debtor from all debts, and from all actions, suits, judgments, &c., in respect thereof.

The plea then averred the performance of the statutory conditions, and in particular that, "immediately on the execution of the deed by the defendant, possession of all the property comprised therein, of which the defendant could give or order possession, was given to the said E. W. Genever;" that the plaintiff was bound by the deed in respect of his present claim; that the defendant had "always been ready and willing to pay the first instalment of 2s. 6d. in the pound on the amount of the plaintiff's debt, and to give the plaintiff the promissory note of himself and the said Henry Barratt, for the amount of the second of the said instalments, bearing date the day of the said registration, and payable to the plaintiff three months after date; and he now brings into court the sum of 5l. 18s. 6d., being the full amount of the said instalment, ready to be paid to the plaintiff; and before pleading this plea he tendered to the plaintiff the amount of the said first instalment and the said promissory note."

Demurrer and joinder.

Macnamara (Nov. 15), in support of the demurrer. (1) The

(1) Some discussion arose upon the form of the plea, but it was agreed that it was a good plea to the further maintenance of the action under s. 68 of the

deed is open to three objections. First, there is no delivery of possession of the property comprised in it; secondly, there is no reservation of rights against sureties; thirdly, either the release is conditional on payment of the composition, and the plea bad for not shewing the performance of the condition, or, if it be absolute, the deed is unreasonable, because it gives no adequate consideration to the creditors for their release.

As to the first objection, the deed contains a present and immediate assignment to the trustee: but by the terms of the deed, the debtor is to remain in possession till default in payment of the composition, and whilst he is in possession he is allowed an absolute power of dealing with the whole property. The delivery of possession, therefore, alleged by the plea is merely illusory, and is not such a delivery as is contemplated by the seventh condition of section 192 of the Bankruptcy Act, 1861, which provides that, "immediately on the execution of the deed by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees."

[He was then stopped by the Court.]

Henry James, in support of the plea. First, the omission of a clause reserving rights against sureties cannot be material, until it is shewn that there are sureties a creditor's rights against whom will be affected by its absence. Secondly, the release is evidently not conditional, but absolute, being expressed to be made in consideration of the covenant and agreement; the case is, therefore, not within *Fessard v. Mugnier*. (1) Neither is the deed unreasonable, although the debtor only gives his covenant in return for the release. The principle now adopted by the courts is, to leave the creditors to determine what is for their interest, and to interfere only when the deed makes an inequality between them. In *Keyes v. Elkins* (2) a deed was upheld, in which the debtor's covenant to pay a composition was the only consideration given to the creditors for an absolute release, or a covenant not to sue, which is for this purpose equivalent to a release. Thirdly, the provision as to the

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Common Law Procedure Act, 1852. In *Garrod v. Simpson*, 3 H. & C. 395; 34 L. J. (Ex.) 70, the plea was similar in form.

(2) 18 C. B. (N. S.) 286; 34 L. J. (C. P.) 125.

(3) 5 B & S. 240; 34 L. J. (Q. B.) 25.

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debtor's possession of the property assigned is not unreasonable, for the deed would be valid though there were no *cessio bonorum* at all, as is decided by *Clapham v. Atkinson*. (1) If then there need be no conveyance of property at all, the deed cannot be bad because it conveys property under certain restrictions. The provision neither creates any inequality between the creditors, nor puts them in a worse position than they would otherwise be in. On the contrary, the possession of the property, and the power of dealing with it in trade, may be the only means by which the debtor can perform his covenant. The covenant and not the property is looked at in the first instance as the creditors' fund, and it is probable that the composition promised, and which depends on the profits in trade, may be of much greater amount than the value of the debtor's goods. The provision is, therefore, for the benefit of the creditors; but if not, it cannot be denied that the trustee might have been empowered by the deed, at his discretion, to replace the debtor in the possession of his goods, in order that he might acquire by his dealings with them a fund for the payment of his debts: and for the purpose of this dealing, an absolute control would be essential. But if so, why may not the creditors exercise the discretion themselves, and prescribe this remission in possession as a condition for the transfer of the property? Neither is such a provision contrary to the seventh condition of section 192. If that condition is to be construed literally, it has been literally complied with, for the plea states possession to have been delivered. But the more reasonable construction is, to read it as meaning that, wherever property is comprised in the deed, possession shall be *bonâ fide* delivered according to its terms. If the insertion of this condition in section 192 justified the inference contended for, it would justify much more strongly the inference which it was formerly attempted to draw from it, that a deed, in order to be valid under the act, must contain a *cessio bonorum*, and the decision against this latter view supports the present argument. The object of that condition was, not to prescribe to the creditors what form of deed they should adopt, but to protect them against a fraudulent retention of the property contrary to the terms of the deed. But here the state of facts excludes the possibility of fraud, for the mode in which

(1) 4 B. & S. 730; 34 L. J. (Q. B.) 49.

the property is to be dealt with appears on the face of the instrument.

Macnamara in reply. In *Clapham v. Atkinson*, (1) the court of Exchequer Chamber, referring to the words of section 192, seemed to think that there might be two kinds of deeds under the act; one relating to the debtor's debt and liabilities, the other to the distribution, management, &c. of his estate. That case decided that a deed of the first class might be valid without any assignment of property; but this deed is one which on the face of it purports to assign the debtor's goods, and is therefore not within that decision. On the other hand it is not an inspectorship deed, which would not operate by means of a *cessio bonorum*, and would not be made with a view of at once acquitting the debtor; for it is a deed which purports to give the debtor a discharge, and which contains a transfer of property. Taken as a deed of this kind, it is unreasonable, because it puts all the property it professes to convey under the debtor's control, and gives neither the trustee nor the creditors any power of preventing the wasting of the existing goods, or of providing for the substitution of others, or of determining the debtor's control over them. It is also contrary to the statutory condition, which means that when property is conveyed it shall be done *bonâ fide*, and not in a merely colourable manner.

[BRAMWELL, B. Is it not reasonable to say that the condition is not intended to regulate the form of the deed, but to provide what shall be done, the deed being so and so?]

It does not provide that there shall be a transfer of property, but that, if there be, it shall be a real one. Secondly, as to the omission of the clause reserving rights against sureties, this is so usual and necessary a clause that the creditors are entitled to require its insertion, for in its absence there is nothing to modify the effect of the release in destroying those rights; see per Crompton, J. in *Keyes v. Elkins*, (2) per Blackburn, J. in *Hidson v. Barclay*. (3) The fact that the debtor's debt is secured to any one of his creditors by sureties is not within the knowledge of his

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(1) 4 B. & S. 730; 34 L. J. (Q. B.) 49.

(2) 5 B. & S. 240—253; 34 L. J. (Q. B.) 25—29.

(3) 3 H. & C. 361—369; 34 L. J. (Ex.) 217.

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other creditors, but is within the knowledge of the debtor, and the creditors ought not to be compelled to make the inquiry nor have they the means of doing so. The plaintiff may be defeated by this deed, which may be really invalid by reason of this hidden defect; and then, he having lost his rights, a secured creditor may afterwards avoid the deed, and recover his whole debt against both the debtor and his sureties, which will establish an inequality amongst the creditors. In *Balden v. Pell* (1) it was held, that any creditor might take advantage of a condition requiring creditors to whom the debtor had given bills to indemnify him against the claims of holders, without shewing that there were any bills to which the clause could apply.

[CHANNELL, B. In that case a positive act was required to be done, so that upon the face of the deed it appeared that it was invalid, here the plaintiff only complains of an omission.]

The principle is the same; the stipulation there would have prejudiced no one if there had been no creditors to whom it could apply, but it was held that the plaintiff was not bound to prove their existence; the only difference is, that here the fact that the deed is silent makes it a more dangerous snare. Thirdly, it is unreasonable, for in order to support the plea the defendant must say that the release is absolute. If it is conditional on a tender of the composition being made according to the deed (that is at the date of registration), no such tender is averred; the tender averred is no fulfilment of the condition, and therefore the plea is bad: *Hazard v. Mare*, (2) *Fessard v. Mugnier*. (3) Now this is a release, the most flexible of instruments, and reading the whole together, and with reference to its probable intention, the true construction is to make the release conditional: *Payler v. Homersham*. (4) And since in such a case equity would only relieve on terms, it will not assist the plea that it is pleaded equitably. If, however, it is not conditional, the deed, compelling the creditors to take only the debtor's promise as a consideration for an absolute release, is unreasonable on grounds similar to those before stated

(1) 5 B. & S. 213—219; 33 L. J. (Q. B.) 200.

(2) 6 H. & N. 434; 30 L. J. (Ex.) 97.

(3) 18 C. B. (N. S.) 286; 34 L. J. (C. P.) 125.

(4) 4 M. & S. 423.

[BRAMWELL, B. In one sense all such deeds, by which creditors are beaten in detail, and compelled to take less than their legal claims, are unreasonable, but not in such a sense as we can act upon. We have not to see that the deed shall be reasonable and fair, but we must give effect to it if we do not see that it is palpably *unreasonable* and *unfair*.]

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BRAMWELL, B. We reserve judgment on the point as to the delivery of possession, but I think the parties are entitled to hear our opinion on the other grounds of objection to the deed.

As to the omission of a clause reserving rights against sureties, the answer to the plaintiff's objection is, that it does not appear by any averment in the pleadings that there are any creditors secured by sureties. It is no doubt a reasonable and useful clause to introduce in general, but we cannot say that its absence is fatal, unless it is shewn that there actually are circumstances under which it could have effect if it were present. My brother Channell has distinguished the case cited, *Balden v. Pell*, (1) by shewing that the covenant there was that something should be done, whereas here the objection is only that there is an entire silence on the subject.

It is next said that if the release is absolute, and not conditional on payment of the composition, it is unreasonable. In my own private opinion this may be so, but it is for the creditors to say whether they will take 5s. instead of 20s., and cases are conceivable where it would be really to their advantage, as for instance if by this arrangement they obtained the additional liability of a surety. But whether expedient or not, we cannot say that it is unreasonable in point of law, that is, unreasonable in itself and under all circumstances, and therefore this ground also fails.

With respect to the remaining point, whether the release is or is not conditional, there can be no doubt. It is in terms absolute, and there is nothing to limit the absoluteness of its terms, consequently no question as to the necessity of a tender can arise.

CHANNELL, B. On these three points I am of the same opinion.

(1) 5 B. & S. 213 ; 33 L. J. (Q.B.) 200.

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If the deed is not on its face unreasonable, we cannot assume the existence of sureties and rights against sureties, in order to make it so.

As to the objection that the absolute release contained in it is unreasonable, it is true that the courts have frequently held deeds unreasonable when the creditors were not placed on an equal footing; but here no argument has been, or can be, urged to shew that any inequality is produced by this clause, taken by itself. I agree, indeed, that there may be cases where, though there is no inequality between the creditors, the deed is so unreasonable that no probable state of facts will justify its provisions; but that is not so here, and I protest against the notion that, because we, as judges, may think some provision which the creditors have agreed to inexpedient, we can therefore say, as a matter of law, that it will nullify the deed.

I also think that the release is absolute and not conditional, and, therefore, the point as to the tender does not arise.

PIGOTT, B. I am of the same opinion. As to the non-reservation of rights against sureties, I need add nothing to what has been said. It is also objected that the deed is unreasonable; to judge of that question, we must first determine in what sense we use the term. If by it is meant *inexpedient*, then it is a matter for the contracting parties to determine upon; but if it means *unequal*, or *unjust*, which is the proper sense of the word, so far as we are judges of it, I can discover nothing unreasonable in the release, though absolute. And, thirdly, I am clearly of opinion that the release is absolute; it is expressed to be made *in consideration of the covenant and assignment*; and it is impossible, in the face of these words, to make the payment of the composition a condition precedent merely on the ground that it might be more expedient for the creditors. The question as to the tender, therefore, does not arise.

POLLOCK, C.B. I should myself have preferred postponing the expression of my opinion until we could have given judgment on the whole case; but as my learned Brothers thought it due to the parties to state their views now upon that portion of the case on which we are all agreed, I have only to say that I entirely concur with them in opinion on the points upon which

they have delivered judgment, and for the reasons they have stated.

Cur. adv. vult.

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Dec. 5. The judgment of the Court (Pollock, C.B., and Bramwell, Channell, and Pigott, BB.) was delivered by

BRAMWELL, B. In this case a deed was pleaded in answer to a money claim, which was said to be binding on the plaintiff, though not an executing party to it, because it was executed by the proper number of creditors, and with the formalities necessary to give it validity under section 192 of the Bankruptcy Act, 1861. We disposed of several objections at the hearing; the remaining objection taken to the deed by the plaintiff was, that although it assigned the defendant's property to a trustee for the creditors, yet by its terms it permitted the debtor to continue in possession of the property until default should be made in payment of the stipulated composition of 5s. in the pound. This was said to be in direct violation of the 7th condition of section 192 of the act, which requires that possession of all the property comprised in the deed shall, immediately on its execution, be given to the trustee. This point we reserved for consideration, and we have come to the conclusion that, notwithstanding this objection, the deed is good. It is manifest that it must be so, when it is considered that there is no necessity for any assignment at all of the debtor's property; and if there need be none, it would be absurd to say that this additional advantage given to the creditors may not be modified at the pleasure of the parties, provided it is not so dealt with as to transgress any of the rules laid down by the courts with respect to the validity of such deeds in general. No doubt such conditions might be annexed to it as to transgress those rules; but that is not the case here, and the only objection to the condition is its supposed conflict with the statutory condition above referred to. But the true and sensible construction of that condition is to read it as providing, that when, by the terms of the deed, property is to be given up to the trustee, then, in order to make the deed binding on non-assenting creditors, it must be given up according to those terms. We, therefore, think the deed good, and the demurrer must be overruled.

Judgment for the defendant.

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[IN THE EXCHEQUER CHAMBER.]

WHITTAKER v. LOWE.

Bankruptcy.—Deed of Arrangement — “Value” of Creditors—Secured and Unsecured Creditors—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134) s. 192.

Section 192 of the Bankruptcy Act, 1861, requires that, a deed of arrangement between a debtor and his creditors shall, in order to bind non-assenting creditors, be assented to or approved of in writing by a majority in number, representing three-fourths in value of the creditors of such debtor, whose debts shall respectively amount to 10*l.* and upwards :—

Held (affirming the judgment of the court below), that, in determining whether the requisite majority in value of the creditors have assented to the deed, the value of securities held by secured creditors is not to be deducted.

APPEAL by the plaintiff against a judgment of the Court of Exchequer, discharging a rule to set aside the verdict for the defendant.

The action was tried at the Manchester Spring Assizes, 1865, before Mellor, J. The declaration was on the ordinary money counts, and the defendant pleaded to the further maintenance of the action, a release by a deed of arrangement entered into, since action brought, between himself and the requisite majority in number, representing three-fourths in value of his creditors. It appeared upon the trial that the defendant's creditors were some of them secured and some unsecured. The defendant had himself made a valuation of the securities held by his secured creditors, in accordance with a Bankruptcy order of the 22nd of May, 1862, with a view to the registration of the deed under section 192. The deed was subsequently duly registered. The valuation made by the defendant was disputed by the plaintiff, and the jury eventually found that the securities were worth considerably more than the sum at which the defendant had valued them. If however, their real value as found by the jury was to be deducted from the debts of the secured creditors, it became manifest that the requisite majority in value had not assented to the deed. If, on the other hand, the value of these securities as so found, was not to be deducted, the requisite majority in value

had assented. Under these circumstances a verdict was entered for the defendant, leave being reserved to move to enter a verdict for the plaintiff, on the ground that the value of the securities ought to be deducted in reckoning what was the requisite majority in value of the defendant's creditors, and that the deed pleaded was therefore invalid, not having been executed by the majority in number, representing three-fourths in value of the defendant's creditors, as required by the Bankruptcy Act, 1861 (24, 25 Vict. c. 134) section 192. The first clause of that section enacts, in order that a deed of arrangement between a debtor and his creditors may be valid, that "a majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed."

In Trinity term, 1865, *Holker* obtained a rule *nisi*, pursuant to the leave reserved.

Later in the same term (May 10), *R. G. Williams* shewed cause, and *Holker* was heard in support of the rule.

The Court of Exchequer discharged the rule, considering themselves bound by the decisions in *Ex parte Godden, re Shettle*; (1) and *Turquand v. Moss*. (2)

Holker for the appellant, the plaintiff below. The value of the securities held by a creditor should be deducted. In *Re Smith* (3) Westbury, C., expresses an opinion that the "value" of the debt is the amount of the debt *minus* the property held by the creditor. "A creditor's debt, under a trust deed," he says, "must be valued on the same condition as a debt in bankruptcy is proved, *i.e.*, for the balance after deducting the security." In *Ex parte Spyer*, (4) the point is treated in argument as settled. Then as to the authorities followed by the court below. In *Ex parte Godden, re Shettle*, (1) the question seemed rather whether a secured creditor was to be counted *at all*; and in *Turquand v. Moss*, (2)

(1) 1 De G. J. & S. 269; 32 L. J. (3) 10 L. T. (N. S.) 551.

(Bkr.) 37.

(4) 1 De G. J. & S. 318; 32 L. J.

(2) 17 C. B. (N. S.) 15; 33 L. J. (Bkr.) 62.

(C. P.) 355.

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Byles, J., intimates his dissatisfaction with the authority of *Ex parte Godden* (1) by which he felt bound. The question really depends on the construction to be put on the act of 1861.

[WILLES, J. In the recent act is there anything answering to the proviso at the end of section 224 of 12 & 13 Vict. c. 106; a section which also applied to deeds of arrangement, and which is now repealed? By that proviso the value of the securities was to be deducted.]

There is nothing expressly answering to it; but it is contended that the law is clear that secured debts must not be reckoned, and that therefore the proviso was unnecessary. The intention of the legislature was to give every creditor a control over the debtor's property proportional to his stake in it, and the language of the act is sufficient to carry out that intention. By section 197 it is provided, that "except where the deed shall expressly provide otherwise the court shall determine all questions arising under it according to the law and practice in bankruptcy." Then section 97 enacts that "in the computation of debts for the purposes of any petition under this act, there shall be reckoned as debts sums due to creditors holding mortgages or other available securities, or liens, after deducting the value of the property comprised in such mortgages, securities, or liens," and the practice under this section has been to deduct securities in proving debts. In sections 109, 110, 116 and 124, the word "value" is used with the meaning now contended for.

[MONTAGUE SMITH, J. But the proceedings prescribed by these sections are all after proof, are they not?]

Section 110 contemplates all creditors whether they have proved or not. It gives power to the major part in "value" at the *first* meeting after adjudication to suspend the proceedings in bankruptcy. At the first meeting it would be unlikely that all creditors would have proved.

[MONTAGUE SMITH, J. But until the creditors have proved, there is no constituency.]

These sections at all events, shew what "value" means by the law and practice of bankruptcy. Again in sections 185, 187, relating to the change from bankruptcy to arrangement, the word

“value” is used in the same sense as it is used after debts have been proved.

R. G. Williams for the respondent, the defendant below, was not called upon.

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WILLES, J. We are of opinion that the judgment of the Court of Exchequer ought to be affirmed. The question turns on what is the true construction of the first member of section 192 of the Bankruptcy Act, 1861. That member of the section expresses one of the conditions under which a deed of arrangement shall be binding, and is in these terms:—“A majority in number, representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall . . . in writing assent to or approve of such deed;” and the point to be decided now is, whether, in ascertaining who are the persons answering to the description of creditors representing three-fourths in value, securities held by creditors are to be taken into account. Now, three modes of answering this question have been suggested. First, you may apply a like test in considering who are to constitute a majority in *number*, as in considering who are to constitute the three-fourths in value; and in so doing you are, it is said, to exclude in each case the fully secured creditors. But secondly, because it is said to be impossible to allege that a person holding security is rendered thereby *not a creditor*, it is argued that as it would be impossible so to exclude him in reckoning the majority in number, this section must be taken to mean that he must be reckoned in value, according to the debt presently due to him. That was in effect, the answer of the Lords Justices in *Ex parte Godden, re Shettle*, (1) and in *Turquand v. Moss*. (2) In the latter case, my Brother *Byles* considered that but for *Ex parte Godden*, the question might perhaps have admitted of a different answer, but he did not suggest any distinction between the treatment of creditors to ascertain the majority in number, and to ascertain the three-fourths in value. He appears to have thought that, as it might be unjust to count the secured debts, persons fully secured ought to be excluded altogether. The third answer to

(1) 1 De G. J. & S. 260; 32 L. J. (Bkr.), 37.

(2) 17 C. B. (N. S.) 15; 33 L. J. (C. P.) 355.

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the question at issue is that suggested by Lord Chancellor *Westbury* in *re Smith*. (1) Substantially, it is this: It is true that a person with security is nevertheless a "creditor," and would be so even though his security exceeded his debt. He could not be said not to be a "creditor" until the amount of his security is realized. He must therefore be counted to make up the majority in number; but, inasmuch as his debt may be said to be of little or no value in the peculiar sense of being at no risk, it is not to be taken into account at its full amount. The Lord Chancellor, therefore, suggested a different answer, according as the creditors were being dealt with in regard to a majority in number or in regard to the debts being three-fourths in value.

The question obviously turns upon the construction to be put on the word "value." Both the weight of authority, and of reasoning, I may add, is on the side of reckoning as a "creditor" a person even fully secured, and he must be included in making up the requisite majority in number. Upon that point it is unnecessary to say more. But there is considerable difficulty in construing the 192nd section with regard to the question, whether the securities held by a creditor should be taken into account in reckoning the three-fourths in value. For it may be said that the legislature surely did not intend to leave to the sense of policy or convenience in the courts, the manner in which secured creditors are to be treated—whether their securities are to be reckoned or whether they are not. I can understand a man of good sense and business habits, saying, "My security is not realized; it may never be realized; it may fall or rise; I do not choose to sell now at a price, of which my debtor might afterwards complain;" and in such a case, he might well ask, what is the tribunal which is to settle the matter. He might himself, be of opinion that it would be better to let all the creditors come in and vote in respect of their entire debts. But while that might be the opinion of one man, another might not see the difficulties which were supposed by the former to exist, and might consider it sufficient if the probable value of the secured creditor's debt were ascertained. He might think the legislature would prefer that such difficulties and doubts should exist to

giving a secured creditor an inequitable right of disposing of the property of the debtor. There are powerful arguments on both sides, and I should feel great difficulty in deciding between them.

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But I have nothing but the Bankruptcy Act before me, and I decline to decide at all upon the question as one of policy. I must look at the language of the act alone. And the real question is, What is the meaning of "value of the creditors?" The expression is a somewhat loose one. "Value of the creditors," must be read as an abbreviation of "value of the debts of the creditors." Now, does this mean the value of the debts in money's worth, when the security is realized, or, perhaps, after a sale in the market, though that would scarcely be a possible construction? *Primâ facie* I should be disposed to say that the "value" of a debt, meant the amount of the debt itself, and that interpretation I find adopted in section 116 of the act of 1861. That is the section relating to the choice of the creditors' assignee, and "value" there clearly means amount; because it is only creditors who have proved, that are dealt with. I am also confirmed in this being the true construction by section 97, which expressly provides that, in the computation of debts for the purposes of any petition under this act, there shall be reckoned as debts, sums due to creditors holding mortgages or other available securities or liens, after deducting the value of the property comprised in such mortgages, securities, or liens, adding such interest and costs as shall be due in respect of any of the debts. Here then we have an express provision, 1st, that persons holding mortgages, &c., are "creditors," and 2ndly, "for the purposes of any petition" (a phrase which does not include this case) debts are to be reckoned after deducting the value of the property comprised in such mortgages, &c. Where an uncertainty existed as to the real value, the judge of the court could immediately determine it. Then come the words "such interest and costs as shall be due in respect of any of the debts," which are also to be reckoned as debts. There is therefore an intention expressed in section 97, to provide a special mode of ascertaining debts.

Now, section 97 is affirmatively expressed on this subject with respect to the question of "value" in a different class of cases from

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the present. But not only is the maxim, *expressio unius est exclusio alterius*, therefore, applicable, but another circumstance must be noticed, because it is part of the history of the statute, and is suggested by reference to an act (12 & 13 Vict. c. 106) *in pari materiâ*. I mean that the 12 & 13 Vict. c. 106, in dealing with a cognate matter, did expressly introduce the provision which we are now asked to introduce by construction. The words are the same,—with the exception of the word “such,”—as in s. 97 of the more recent act. They are to be found at the end of s. 224, whereby it was provided that every creditor “shall be accounted a creditor in value in respect of such amount only, as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him.” The enactment uses the word “such,” but the difference is not material. Then the proviso uses words expressing a condition, viz., “upon an account fairly stated.” It seems, therefore, as if the framer of the section felt the very difficulty to which I have already referred as to who is to settle what is the amount due to the securities held by the creditor, and that he tried to solve it by inserting the words, “upon an account fairly stated.” These words are omitted in section 97 of the Act of 1861, but their place is supplied by the jurisdiction of the commissioner.

In section 192, however, the whole proviso which was contained in section 224 of the Act of 1849 is omitted. The latter section is now repealed. I am, therefore, almost inclined to say that the legislature has, as it were, ostentatiously shewn an intention that the proviso so repealed should not apply. Putting, then, the best construction that we can upon the language of the act of 1861, and setting aside all questions of mere policy or convenience, remembering that we do not sit here as legislators, it should seem that the judgment of the court below was right. It must, therefore, be affirmed.

BLACKBURN, J. I am of the same opinion. The question is entirely one of the proper construction of the statute of 1861. Did the legislature intend that it should bear the construction contended for by Mr. Holker? That is the question we have to answer. Now, it is plain that a creditor who holds securities is

nevertheless a "creditor," the only difference between him and an unsecured creditor being that he has securities which he can make available, and if he does so make them, he is not to be suffered to pay himself the debt due to him twice over. But until he has made his securities available, he is a "creditor" to the amount of the debt due to him. By the old law he still remained, although fully secured, a creditor who could petition for an adjudication. So stood the law in 1849. Then the statute passed in that year left his position in bankruptcy untouched. But by section 224 there was, for the first time, introduced a power of making arrangements by deed for a composition. That section enacted that every deed of arrangement between a trader debtor and his creditors executed by six-sevenths in number and value of those creditors, whose debts amounted to 10*l.*, was to be binding on all; and upon this there was a proviso that "every creditor shall be accounted a creditor in value in respect of such amount only, as upon an account fairly stated, after allowing the value of mortgage property, or other such available securities or liens from such trader, shall appear to be the balance due to him." The proviso pointedly directs the deductions indicated to be made upon an account "fairly" stated. But whilst the section, which was repealed by the act of 1861, is re-enacted in substance, for some reason or other—perhaps from the difficulty being felt of ascertaining what really was the fair value of the debt in each case—the proviso is not re-enacted. The legislature repeal section 224, and re-enact it in substance by section 192, omitting the proviso. At the same time, they insert a similar provision in section 97, probably because in the cases there contemplated the value of the security might be more easily ascertained. However that may be, we ought not, I think to say that the legislature did mean what they seem to have declared that they do not. The weight of authority also is in favour of the same construction. I, therefore, think that the judgment of the court below should be affirmed.

MELLOR, MONTAGU SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

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ROBERTS AND ANOTHER, v. ROSE.

Nuisance—Abatement by entering land of a third party—Balance of injury—Watercourse—Right to obstruct.

The plaintiffs, by parcel license from L and from the defendant, constructed a watercourse, and thereby discharged the water from their own mines across the land of L, and thence across the land of the defendant. The defendant, having revoked his license, upon the plaintiffs' refusal to discontinue using the watercourse, entered upon the land of L, at a spot near the boundary between it and the land of the plaintiffs, and obstructed the watercourse. The defendant by stopping the watercourse on his own land would have done less damage to the plaintiffs than was actually done, but more damage to L and possibly some damage to the public:—

Held (affirming the judgment of the court below), that the water-course was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after revocation of the license were wrong-doers, was subordinate to the convenience of innocent third persons and of the public.

APPEAL by the plaintiffs from the judgment of the Court of Exchequer making absolute a rule to enter a nonsuit, and also from their judgment in this case discharging a rule to set aside the verdict for the defendant on the third issue.

Declaration.—1st Count: that the plaintiffs being possessed of a colliery were by reason thereof entitled to the privilege of having the water from time to time pumped out of the said colliery, and flow away therefrom along a certain watercourse. Breach: that the defendant wrongfully obstructed the said watercourse, and thereby caused great damage to the plaintiffs, &c.

Second Count: that before the committing of the grievances hereinafter mentioned, the plaintiffs being possessed of a certain colliery, called *Bank Colliery*, did at their own costs and by the license, and with the consent of the owner and occupier of certain land near the said colliery, make a watercourse in the said land for carrying away the water by them from time to time pumped from the said colliery, and from thence until and at the time of the committing of the grievances hereinafter mentioned, during all which period they were possessed of the said colliery, the plaintiffs by the license and with the consent of the said owner

and occupier of the said land enjoyed the advantage of having the water so by them pumped, as aforesaid, flow away from the said colliery along the said watercourse; that the license and consent to enjoy the said advantage, and the plaintiffs' possession of the said colliery continued till the commencement of this suit, and still do continue, and the said license, consent, and advantage were of great value to the plaintiffs; and that the defendant knowing that the plaintiffs were enjoying the advantage aforesaid, wrongfully and wilfully obstructed the watercourse, and thereby prevented the water from flowing along the same away from the said colliery, by means whereof the plaintiffs sustained and will sustain damage in all respects like that in the first count mentioned.

Pleas. First, not guilty. Secondly, to the first count, traverse that the plaintiffs were entitled to the privilege therein mentioned. Thirdly, to the second count, traverse of the license therein mentioned. Fourthly, to the same, that before and at the time when the plaintiffs made the watercourse as in the said count mentioned, and from thence and until, at and after the committing by the defendant of the alleged grievances in the same count mentioned, the defendant was the occupier, and was lawfully possessed of the said land near to the said colliery in which the said plaintiffs made the said watercourse as in the said second count mentioned, and the plaintiffs made the said watercourse in the defendant's said land with the leave and license of the defendant, and with such leave and license used the same until the defendant afterwards revoked such leave and license, and gave notice to the plaintiffs of such revocation, and because the plaintiffs continued to use such watercourse, and to send the water down the same after such revocation and notice thereof, against the will of the defendant, the defendant obstructed the same.

Replication, joining issue as to the first three pleas, and new assignment to the fourth, that the plaintiffs sue not for the obstruction on the defendant's said land of a watercourse on the defendant's land, but for an obstruction, on other land than that mentioned in the fourth plea, and being the land in the second count mentioned, and not being the land of which the defendant was the occupier and possessed as in the fourth plea mentioned,

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of a watercourse made on such other land with the license and consent of William Lowe, the occupier of such other land.

Pleas to new assignment. First, not guilty; secondly, that at the time of the committing by him of the alleged grievances in the new assignment mentioned, the defendant was possessed of certain land adjoining to the land in the new assignment called other land, and the said watercourse in and over such other land was so constructed that the water passing in and along the same was wrongfully discharged from the same on to the said adjoining land of the defendant, and without entering on the said other land in the new assignment mentioned, and obstructing the watercourse on such land, the defendant could not prevent the water from the watercourse from being discharged therefrom, and coming on the land of the defendant in this plea mentioned, wherefore in order to prevent the water from the watercourse from being so discharged and coming on the land of the defendant, the defendant obstructed on such other land the watercourse made on such other land, as he lawfully might for the cause aforesaid.

Replication to pleas to new assignment, first, joining issue thereon; and secondly, as to the second plea, that the obstruction so made by the defendant at the place where it was made was not necessary for preventing the water from being so discharged from the watercourse, and coming on the defendant's land as the defendant knew at the time when he made it; that the obstruction was an obstruction made much higher up the watercourse than the defendant's land, so as to prevent the water from flowing down a large part of the watercourse on the said other land, where the plaintiffs had such license and consent as in the second count mentioned for the flowing thereof; that the water might have flowed along the said last-mentioned part of the watercourse without being discharged from the watercourse, and coming on the defendant's land, or injuring the defendant, and might have been by the defendant lawfully obstructed on the said other land lower down the watercourse after it had flowed over the last mentioned part thereof, and nearer to the defendant's land than the place where he did obstruct it, as the defendant at the time when he made the obstruction well knew and that if the same had been obstructed lower down the watercourse on the said other land and nearer to the defendant's

land as aforesaid, such obstruction would have prevented the water from being discharged from the watercourse and coming on the defendant's land, and would not have caused the damage to the plaintiffs in the second count mentioned; and such obstruction, which the defendant so made, as aforesaid, was an unnecessary and unreasonable mode of preventing the water from being discharged from the watercourse and coming on the defendant's land, and by reason thereof did the plaintiffs unnecessary damage.

Rejoinder taking issue on the second replication to the second plea to the new assignment, and demurrer thereto. Joinder in demurrer.

The demurrer was argued in Michaelmas Term, 1863, when judgment was given for the plaintiffs,(1) and the issues of fact were tried before Keating, J., at the Staffordshire spring assizes, 1864, when the following facts were proved:—The plaintiffs, being the lessees of a colliery called the Bank Colliery, applied in 1860 to Sir Horace St. Paul, who was the owner (subject to a mortgage) of lands adjoining, for permission to make a watercourse from their pit-shaft across his lands to carry away the water pumped out of their mines. Sir Horace St. Paul, by his agent, gave them a written permission accordingly, and they thereupon made a watercourse from the Bank Colliery to a point whence it emptied itself into an old pit caused by the former workings of a colliery called the Broadwater Colliery. A part of the surface of the last-mentioned colliery was in the possession of William Lowe, as yearly tenant to Sir H. St. Paul. The plaintiffs obtained Lowe's license to the making of the watercourse, and it was also used by him for the purposes of brickmaking. Early in 1861 the plaintiffs were required by Sir H. St. Paul's agent to extend the watercourse over the spoil-banks of the old pit in order to join another watercourse which had been used by former lessees of the Broadwater Colliery, and which ran on into a neighbouring canal.

Soon afterwards, in March, 1861, the defendant obtained from the mortgagees of Sir H. St. Paul a lease of the Broadwater Colliery. The lease was of the coal in or under the land, and leave was given to the defendant to occupy such parts of the lands as might be necessary for the due carrying on of the workings of the coal mines,

(1) 3 H. & C. 162; 33 L.J. (Ex) 1.

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and also to make use of watercourses over the land. There was a reservation to the lessors of a right to make watercourses for the working of certain mines excepted from the lease, proper compensation being made to the lessee.

The defendant, on entering into possession, assented to the continuance of the plaintiffs' watercourse. The extension indicated by Sir H. St. Paul's agent, was subsequently made, as well as another alteration at the defendant's request. The extended watercourse continued to be used by the plaintiffs, subject to a peppercorn rent to Sir H. St. Paul, and also by the defendant until the obstruction mentioned hereafter. Lowe continued to give his license so far as his lands were concerned.

In January, 1863, the defendant applied to the plaintiffs for a money payment in consideration of their use of the watercourse, but after some negotiations the plaintiffs refused to pay anything, contending that as the licensees of Sir H. St. Paul they were entitled to the benefit of the exception in the defendant's lease. The defendant thereupon gave notice to the plaintiffs that the watercourse, having become injurious to their mining operations in consequence of water escaping from it into their works, must be discontinued. A similar notice was given on the 26th of February, and on the 28th of February, the plaintiffs not having paid any attention to the notices, the defendant stopped up the watercourse on Lowe's land near to the boundary between that land and the plaintiffs' colliery. The effect of this obstruction was to pin back on the surface of the Bank Colliery all water pumped out of the plaintiffs' mines into the watercourse, and in May, 1863, the water had accumulated to such an extent that it percolated through the soil into the plaintiffs' mines. Considerable damage having thus been done, and the plaintiffs having been forced to incur expense in obtaining another outlet for the water of their mine, this action was brought. There was considerable conflict of evidence as to the reasonableness of the mode in which the obstruction was made, but it was eventually established that if the obstruction, instead of being made at the boundary between Lowe's land and the *plaintiffs*, had been made at a lower point where Lowe's land met the land of the *defendant*, the damage to the plaintiffs would have been less, though the damage to Lowe would

have been greater, and there might also have been injury done to an adjoining public road.

The learned judge ruled that there was a question for the jury on the second replication to the second plea to the new assignment, viz., whether the obstruction of the watercourse by the defendant was an unnecessary and unreasonable mode of preventing the water from being discharged from the watercourse on to the defendant's land. For the purpose of the issue he directed the jury to assume that the defendant had a right to go upon Lowe's land in order to stop the water from so coming on the defendant's land in a reasonable way. Upon all the other issues he directed a verdict for the defendant.

With regard to the issue on the third plea to the second count, the learned judge ruled that the defendant was entitled to a verdict, upon the ground that the lease of the Broadwater Colliery to the defendant had revoked the license in the second count mentioned, and that the defendant had therefore a right to stop the watercourse. He also directed the jury to take all the circumstances into account, and upon a review of these circumstances to say whether the mode and place in which the obstruction actually was made were or were not unreasonable or unnecessary.

A verdict was found for the plaintiffs, leave being reserved to the defendant to move to set it aside and enter a nonsuit, on the ground that there was no evidence to support the second replication to the second plea to the new assignment.

Leave was also reserved to the plaintiffs to enter a verdict on the third plea to the second count of the declaration.

Rules were obtained by the plaintiffs and the defendant pursuant to the leave reserved in Easter Term, 1864. They were argued together later in the same term, (1) when the court made absolute the rule obtained by the defendant to enter a nonsuit, and discharged that obtained by the plaintiffs to enter a verdict on the third plea to the second count of the declaration.

The plaintiffs appealed against the judgment of the court below.

Mellish, Q.C. (H. Matthews with him), for the appellants, the plaintiffs below. There are two propositions to be contended for,

(1) 3 H. & C. 173; 33 L.J. (Ex.) 241.

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first that the judge ought not to have directed a verdict for the defendant on the third plea to the second count; and secondly, that there was evidence for the jury on the second replication to the second plea to the new assignment. As to the first question, it is submitted that the plaintiffs had a license to have the water flow over the place where the defendant obstructed it, and that the defendant's revocation could not apply to that place, the consent of the occupier having been obtained. It applied to another place more remote from the plaintiffs' land than that where the obstruction was erected. Secondly, there was evidence to prove the second replication above mentioned. The defendant did not obstruct the watercourse in a reasonable way. If he could, as here he might, have put an end to the nuisance complained of by doing an act on his own land, he had no right to go out of his own land to do it.

[BLACKBURN, J. The effect would have been that some damage would have been done to Lowe.]

That might have been so; but still the defendant had no right, without notice to Lowe, whose consent to use the watercourse the plaintiffs had, to stop up the watercourse in the place he did, thereby throwing all the water into the plaintiffs' mines. Lowe would have no ground of complaint except against the plaintiffs, who originally turned the water on to his land. They were the original wrongdoers, and alone answerable, *Scott v. Shepherd* (1). The defendant therefore was able to stop the watercourse on his own land without incurring any liability to anybody; had he then any right to go off his own land and stop it much nearer to the plaintiffs' boundary, thus doing them far greater damage?

[LUSH, J. Had the plaintiffs, who were wrong doers, any right to dictate where the water should be stopped?]

The rule is, it must be stopped on the land of the person stopping it, or else on the land of the wrong doer; *Penruddock's Case*. (2) Moreover, in this case the plaintiffs had a right to the flow of water over Lowe's land. They had Lowe's license and, *quâ* the defendant, were in the position of Lowe himself. For this purpose Lowe's land was the plaintiffs' and the defendant had no right to come upon it to abate a nuisance, unless in case of absolute necessity.

(1) 1 Sm. L. C. 4th Ed. 343.

(2) 5 Rep. 100. b.

[MONTAGUE SMITH, J. The question seems really to depend on this: whether Lowe could have brought an action against the defendant if he had stopped the watercourse on his own lands.]

No action could have been brought. A man may do what he pleases on his own land, unless he interferes with an easement or natural right of some other person; *Gale on Easements*, 3rd Ed. 520. *Com. Dig. Nuisance Tit. (C.)*; and if there be a nuisance which a person can put an end to by doing an act on his own land, he has no right to go out of his own land to do it.

Gray, Q.C. (*Macnamara* with him), for the respondent, the defendant below, was not called on.

BLACKBURN, J. (1) We are of opinion that the judgment of the Court below should be affirmed. Upon one point, however, which will be presently mentioned, my brother Montague Smith has some doubts. We are all agreed that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself as against the wrong-doer so far as his interference is positively necessary. We are also agreed that, in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think that if, by one of these alternative methods some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all, although an interference with the wrong-doer himself might be justified. Therefore, where the alternative method involves such an interference it must not be adopted; and it may become necessary to abate the nuisance in a manner more onerous to the wrong doer.

Now, applying these principles to this case it appears that a license was originally given to the plaintiffs by Lowe, and by the defendant, to use a watercourse over their lands. It was a revocable license, to which the plaintiffs, Lowe, and the defendant were all parties, whereby the plaintiffs were permitted to pump out water from their mines and send it down over the lands of Lowe and the defendant. Then, as soon as the defendant revoked the license, it became wrong on the part of the plaintiffs to pour down the water

(1) WILLES, J. heard a portion of the argument, but left the Court before judgment was delivered.

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any longer. Lowe had licensed the plaintiffs only so long as the water sent on to his land would flow out of it again. If Lowe had been told of the defendant's revocation, he would have said that the flow of water must be stopped, and the plaintiffs would have had no right to complain of his stopping it, when, at his instance, the very thing must have been done to the plaintiffs that actually has now been done. Could the defendant, then, have lawfully built this dam as now proposed whilst the plaintiffs continued to send water over Lowe's land, thus turning it into a pond? I think not; such a proceeding would have done a wrong to Lowe, an innocent person, and also perhaps to the public road. That being so, it follows that if the defendant had stopped the watercourse in the way the plaintiffs say he ought to have done it, he would have done an injury to Lowe; and therefore it seems, looking at the mischief actually done to the wrong doer, and considering, at the same time, that mischief would have been done to an innocent third party by taking the course suggested, that the way of making the obstruction actually adopted was fair and reasonable.

So far we are all agreed; but then it is to be observed that the defendant, in obstructing the watercourse at the place he chose, did commit a trespass against Lowe by entering on his land and stopping the watercourse where he did. Either way, therefore, there was a wrong as regards Lowe; and my brother Montague Smith thought that perhaps the relative amount of injury was for the jury, and that for this reason there was ground of application for a new trial. The majority of the court, however, think, as to this point, which was not put at the trial, that the slightness of the injury done, coupled with the fact that Lowe made no complaint, brings the case within the principle that a nonsuit shall not be disturbed, on the ground that there is a scintilla of evidence in favour of a contrary verdict.

MELLOR and LUSH, JJ. concurred.

MONTAGUE SMITH, J. I agree in the principles which have just been laid down. My only doubt is, whether the question of fact with reference to Lowe's position is not for the jury. Now, I think that if the defendant could have entered on Lowe's land without committing a trespass, or if he could have stopped up the

watercourse at the lower point without being subject to an action on the case at the suit of Lowe, then he would have been liable in this action, because he would in such a state of things, having two methods open to him, have been bound to choose the point of obstruction least inconvenient to the plaintiffs. But he could not, in fact, have stopped the watercourse at the lower point without flooding Lowe's land. Then again, by doing the work as he did, the defendant subjected himself to an action of trespass at the suit of Lowe. There is therefore a balance of injury, and that is a question of fact for the jury, upon which I do not think them warranted in the conclusion to which they came. That being so, I express a doubt as to whether we are not, in deciding that there was no evidence on this issue, taking upon ourselves too much of the province of the jury. Otherwise I concur with the rest of the court.

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Judgment affirmed.

[IN THE EXCHEQUER CHAMBER.]

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*Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—Deed under section 192—
 Unreasonable provisions—Construction, “Creditors.”*

The word “creditor” in the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), means any person who could have proved against the debtor's estate in bankruptcy.

More v. Underhill, 4 B & S. 566, overruled.

An inspectorship deed under s. 192 of the Bankruptcy Act, 1861, made between the debtor, inspectors, and all persons then creditors of the debtor, or who would be entitled to prove against his estate in bankruptcy, (cl. 9.) provided for payment of dividends to all such creditors and persons entitled to prove, (cl. 14, 16) allowed creditors to assent for part only of their debt, specifying what part, (cl. 19) allowed the inspectors to set apart dividends for non-assenting creditors and unascertained debts, (cl. 23) gave to the certificate of the inspectors the effect of a discharge in bankruptcy, (cl. 30) provided that if not valid under the act it should bind executing and assenting creditors, (cl. 31) provided that it might be pleaded in bar with the same effect as an order of discharge under the Bankruptcy Act, 1861, and (cl. 32) that anything contained in it contrary to the bankrupt law should be treated as expunged:—

Held (affirming the judgment of the court below), that the deed was valid under 24 & 25 Vict. c. 134, s. 192.

DECLARATION on a bill of exchange drawn by the plaintiff upon and accepted by the defendant, with *indebitatus* counts.

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Plea, an inspectorship deed under s. 192 of the Bankruptcy Act 1861, made between the debtor of the first part, three inspectors of the second part, and "the several persons, companies, and co-partnership firms, who at the date thereof were respectively creditors of the defendant, or who could be entitled to prove under an adjudication of bankruptcy against the defendant, founded on a petition filed on the day of the date of the said deed (thereinafter called the creditors) of the third part;" setting out the 31st clause of the deed, and making the usual averments.

The second replication set out the deed verbatim.

Demurrer and joinder.

The deed was the same as that discussed in *Strick v. De Mattos* (1), and the case was in substance an appeal from that decision, and judgment had been taken without argument in the Court of Exchequer, in order to bring the question before this court.

The substance of the clauses in the deed which were discussed was as follows (2):—

By clause (1), the debtor's estate was to be administered in accordance with the principles of the present bankrupt law in England, or as near thereto as circumstances would permit, having regard to the terms of the deed.

By clause (9), the estate was to be applied (after payment of costs and expenses, and sums paid for the purpose of realizing and winding-up the estate), in paying rateably, and without prejudice or priority, the several debts, claims, or demands of the creditors, until full payment or satisfaction thereof, and of all interest which would be payable thereon under an adjudication in bankruptcy.

By clause (13), each creditor, before becoming entitled to receive any dividend, should, if required by the inspectors, deliver to them a statement in writing of his claim, with all the particulars usual on a proof in bankruptcy, and verify the same by a solemn declaration, both of the amount of the claim and of its consideration, such verified statement not to be conclusive evidence.

(1) 3 H. & C. 22; 33 L. J. (Ex.) 276.

(2) In one of the reports cited of *Strick v. De Mattos* (3 H. & C. 22), the

whole deed will be found set out, in the other (33 L. J. (Ex.) 276) the clauses 7, 9, 13, 19, 30, 31 & 32.

By clause (14), in all cases where any person had received from the debtor negotiable instruments—made, drawn, accepted, or indorsed by him, or on his behalf—which had been negotiated, and were in the hands of third parties, either of such respective parties, namely, the original holders or recipients of such negotiable instruments, and the present or ultimate holders thereof, as well as any intermediate indorsers, might be admitted to execute, or assent to, or approve of the deed, without such act being an admission that they respectively were, or would become, creditors; but, whichever of such respective parties to each such negotiable instrument should ultimately become the real holder thereof for value, should be deemed to be the creditor, and as such the party to the deed in respect of such negotiable instrument; and in that case the execution, assent or approval by the other or others of such parties, in respect of such negotiable instrument, should be considered only as evidence of his, her, or their consent to such holder having or deriving the benefit of these presents in respect thereof, but without prejudice to his, her, or their execution, assent, or approval in respect of any other debt or claim; and until it should be ascertained who would ultimately be the creditor in respect of such negotiable instrument, all the persons who should have executed, assented, or approved in respect of such instrument, should be deemed to be one creditor only. And, generally, any person who might claim to be, or expect to become, a creditor or claimant, whether presently or by the ultimate non-payment or deficiency of any negotiable or other security which he might hold, or upon the adjustment of any difference or unsettled account, or by any other event, might execute, assent, or approve, without such execution, assent, or approval, being an admission of his being a creditor or claimant, save in so far as he might be ultimately found to be such creditor or claimant.

By clause (16), in case any creditor should be desirous of executing, assenting, or approving, in the first instance as to part only of his debt or claim, from fear of prejudicing his claim or demand, in respect of the remainder of such or of some other debt or claim, against some other person or persons, notwithstanding the provision in that behalf next thereafter contained,

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such creditor might come in and execute, assent, or approve, in respect of any portion of his debt or demand (such qualification, and the amount of his debt or demand to which he might desire to limit his execution, assent, or approval, to be specified opposite to or under his name subscribed to the deed, or to such assent or approval), and such qualified execution, assent, or approval, should not extend to any other debt or claim so as to prejudice his rights or remedies in respect thereof; but, save so far as any limitation might be so expressed, all the creditors executing, assenting, or approving, should be bound in respect of all, and the entire debts, claims, and demands which they might respectively have against the debtor. And in case any of the creditors should so execute, assent, or approve, in respect of part of a debt, or alleged debt, this clause should not prevent the deed being obligatory upon him in respect of the residue of his debt as a non-executing or non-assenting creditor, by reason of the provisions of the Bankruptcy Act, 1861.

By clause (17), creditors' rights against sureties were reserved.

By clause (19), in case any dividend should be made before all the creditors named in the statement to be prepared by the debtor should have executed, assented, or approved, the inspectors might cause to be set apart a sufficient sum for the purpose of paying like rateable dividends to such last-mentioned creditors, and also for the purpose of paying like dividends to any of the creditors who should have executed, assented, or approved, but the dividends on whose debt should not have been ascertained; or, in case no such sum should be set apart, they should be at liberty to direct that out of the first moneys which should afterwards be applicable to a dividend, the dividend or dividends payable to the last-mentioned creditors should be paid to, or set apart for, them respectively, before any further dividend should be made among the creditors who might have previously executed, assented, or approved, but not so as to disturb any dividends previously paid.

By clause (21), if at any time before the whole of the debtor's estate should be fully administered, dividends of 20s. in the pound should not have been paid, or realized and provided for the creditors, the debtor should, if so required by the inspectors, convey and assign all his estate and effects to such person as the inspectors or

creditors might direct, in trust, to be administered according to the laws of bankruptcy among the creditors; and as to any surplus, in trust for the debtor.

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By clause (23), if, and when the estate should have been fully administered, according to the deed, to the satisfaction of the inspectors, they might certify the fact in writing under their hands, indorsed on or referring to the deed, and thereupon such certificate should be conclusive evidence of the truth of the matters to be therein alleged; or in case of such conveyance or assignment of all the debtor's estate and effects having been made by him as aforesaid, and the same being certified, such certificate (except only for the purpose in the present clause provided for, and without prejudice to the rights of the creditors to or over the property so conveyed or assigned, or to or over any dividends, or funds for dividends, then provided but not actually paid to the creditors) should operate and be a release and discharge to the debtor, as fully and effectually, and in like manner, as an order of discharge under an adjudication in bankruptcy, and might be pleaded accordingly to all actions, suits, and proceedings, in respect of any of the debts, claims, and demands of all or any of the creditors. Provided, that if at any time after such conveyance and assignment the debtor should become bankrupt, and the arrangement made by the deed, or the property comprised in any such conveyance and assignment, should thereby be in any way prejudiced or affected, then such release and discharge as aforesaid should not prevent the creditors respectively from coming in under such bankruptcy, for any purposes for which they would, but for such release and discharge, have been entitled to come in.

By clause (30), it was provided that the deed was intended to be, and should be (so far as it by law might be), a deed of inspectorship within the provisions of the Bankruptcy Act, 1861; but if, for any reason, it could not so operate, it should be binding on all creditors executing, assenting, or approving. And it should be lawful for the inspectors to take and defend all such actions, suits, and other proceedings, as they might think fit, for the purpose of giving effect to it and establishing its validity, and in defence of the debtor at the suit of any of the creditors taking proceedings against him, or refusing to be bound by the deed, and they should

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be indemnified out of the estate in like manner, and to the same extent, as if they had been assignees under an adjudication of bankruptcy against the debtor, founded on a petition filed on the day of the date of the deed.

By clause (31), after reciting that it was intended that the deed should be taken by the creditors in lieu of their several and respective debts, claims, and demands, in respect whereof dividends would become payable under the deed, or proof could be made under an adjudication of bankruptcy against the debtor, founded on a petition filed on the day of the date of the deed, it was declared that if any of the creditors should, whilst the deed was in force, commence or prosecute any action, suit, or other proceeding, in respect of any such debt, claim, or demand as aforesaid, the deed and the provisions therein should operate, and have the same force and effect, as an order of discharge which had taken effect under the Bankruptcy Act, 1861. And that this declaration might be pleaded and used in bar of or as a defence or answer to every such action, suit, or other proceeding, in like manner and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used, in case the debtor had been adjudicated bankrupt in respect of any of the debts, claims, or demands of the creditors, or any of them, and had obtained his order of discharge under such adjudication.

By clause (32), after reciting that it was intended that the estate and effects of the debtor should be administered upon the principles of the bankrupt law, or as near thereto as circumstances would admit of, and that the rights of creditors should be regulated by the same principles, it was declared that the deed should be construed so as give effect to such intention; and that, in the event of anything therein contained being deemed to be inconsistent with those principles, the deed should be read and construed as if such inconsistent matter were expunged therefrom, and had never been part thereof, and in lieu thereof the law of bankruptcy, or the rule of administration adopted thereunder, should be substituted.

June 21, 22. *Joseph Brown, Q.C.* (Day with him), for the plaintiff. First, clause 31, containing the absolute release on which the plea is founded, ought by the operation of clause 32 to be

struck out of the deed, for it is inconsistent with the practice in bankruptcy, where the debtor is only released from his legal liabilities by the final discharge, and up to that time is only protected from process. But, further, it has never been decided by this court that in a deed of this kind such a release is allowable, nor is it reasonable that it should be. For, first, it cannot be provided that a private transaction shall have the same effect as a discharge in bankruptcy, and, secondly, if good it puts the dissenting creditor, who is defeated by it, in the position of losing his right. For he could not afterwards verify his debt under clause 13, and there is no authority for saying that a creditor can maintain an action for a debt after a plea of discharge such as this, and judgment against him thereon, nor that he could prove in bankruptcy. This becomes more obvious if clause 31 is compared with clause 23, where the release which is annexed as a consequence to the certificate there provided for, is qualified so as to save the right to dividends. *Dell v. King* (1), *Hidson v. Barclay* (2), Bankruptcy Act, 1861, s. 161. If clause 31 is rejected as inconsistent with the bankrupt law, the deed cannot be pleaded in bar. *Ipstones Park Iron Ore Company Limited v. Pattinson*. (3)

Secondly, clause 23 is unreasonable in making the certificate of the inspectors conclusive, although in fact the estate may not have been administered, and although some creditors may never have received dividends, especially since foreign creditors will be equally bound. The certificate is made *ex parte*, and without examination of the debtor, and is final. Compare with this the provisions of the Bankruptcy Act, 1861, ss. 140, 141, 159, 168, 171. *Woods v. Foote* (4), *Leigh v. Pendlebury* (5), *Coles v. Turner*. (6)

Thirdly, the effect of clause 30 is to divide the estate among the assenting creditors alone, in case the deed is invalid under the act; and this distribution of the whole estate among a part of the creditors being an act of bankruptcy, it contravenes the policy of the bankruptcy law.

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| (1) 2 H. & C. 84, 33 L. J. (Ex.) 47. | (4) 1 H. & C. 841 32 L. J. (Ex.) 199. |
| (2) 3 H. & C. 361, 34 L. J. (Ex.) 217. | (5) 15 C. B (N. S.) 815; 33 L. J. (C. P.) 172. |
| (3) 2 H. & C. 828, 33 L. J. (Ex.) 193. | (6) 18 C. B. (N. S.) 736; 34 L. J. (C. P.) 198. |

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Fourthly, clauses 14 and 16 allowing a creditor to assent for a part of his debt are bad, since other creditors may be misled by such an assent. Forsyth on Composition Deeds, pp. 51, 52, citing *Holmer v. Viner* (1), *Britten v. Hughes*. (2)

[CROMPTON, J. It does not appear that this has been done in any instance here.]

[BLACKBURN, J. There can be no fraud nor even mistake here, for the scheme of the deed is patent on its face, and a creditor assenting for part only of his debt must express that he does so and must state the amount for which he assents.]

But this would not inform the other creditors of the amount of the remainder of the debt.

Fifthly, the deed makes all who could prove in bankruptcy creditors, but the word "creditors" in the act must mean only those who are strictly creditors, for this is its natural sense, and no extended meaning is given to the word in the interpretation clause, s. 229.

[CROMPTON, J. In section 192 the words are "debts or liabilities;" the latter term is larger than debts.

[BLACKBURN, J. In sections 144, 145, also, the words "creditor" and "debt" appear to be used in the wider sense, for those sections must apply to all provable claims.]

In 12 & 13 Vict. c. 106, s. 172, &c., and 24 & 25 Vict. c. 134, s. 150, &c., special provision is made for the proof of such claims in bankruptcy, but there is no such provision with respect to deeds under section 192. The protection provided by section 198 only applies to debts. *More v. Underhill* (3) is a distinct authority in the plaintiff's favour, for there the defendant would clearly have been protected by a discharge in bankruptcy.

[*Per Curiam*. That case was only an application for a rule *nisi*, and is therefore of less weight.]

Sixthly, clause 19 imports that dividends will not be paid to creditors until they assent, and, taken in connection with clause 30, it enables the inspectors to put a pressure upon dissentient creditors by the threat of holding back the dividends, and by the fear of the estate being wasted in litigation. *Hernuliwicz v. Jay*. (4)

(1) 1 Esp. 134.

(2) 5 Bing. 460.

(3) 4 B. & S. 566.

(4) 34 L. J. (Q. B.) 201.

Beresford (*Mellish, Q.C.*, with him), for the defendant, was desired to confine his argument to the two last points.—The 19th clause does not bear the construction put upon it, but is entirely for the benefit of non-assenting creditors. Before the assenting creditor gets his dividend, a sum is to be set apart for the others, but the assenting creditor does not entitle himself by assenting, nor does the dissenting creditor lose his right by holding back. In each case the creditor only gets his dividend by proving his debt, and on such proof he does get it. There are no words of exclusion.

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[CROMPTON, J. That seems to be so.]

As to the other point, the word “creditors” in section 197 must mean all who could have proved in bankruptcy, for all rights under a deed are by that section assimilated to rights in bankruptcy; but in section 192 the word must have the same meaning, and must therefore include all who could prove. If the other construction is adopted, the act fails to carry out the intention of the legislature; for that intention obviously was, to prevent the estate from being wasted and the creditors delayed by proceedings in bankruptcy, and the legislature must therefore have intended to settle all rights and liabilities which would have been settled by the tribunal for whose action the deed is substituted. In *Ex parte Mendel, re Moor* (1), it was assumed that the claim on a contract broken before the making of the deed could have been proved under the deed, and that case is therefore an authority for the extended construction.

Brown, Q.C., in reply. Creditors in respect of an unliquidated debt could not make an affidavit of debt, nor file a petition of bankruptcy; their exclusion therefore will not give an opening for bankruptcy proceedings. They cannot be taken into account in estimating the value of the debts at the date of the deed, for the amount of their claims is then unknown. In many cases the creditors for damages exceed in amount the creditors for debts properly so called, as in the case of underwriters. It is therefore unreasonable that they should be bound by the decision of the other creditors.

Cur. adv. vult.

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Dec. 1. The judgment of the court (Crompton, Willes, Byles, and Blackburn, JJ.) was delivered by—

BLACKBURN, J. This was a case in error from the Court of Exchequer, which was argued in the sittings after Trinity Term before Mr. Justice Crompton, my brothers Willes and Byles, and myself. My brother Keating, who heard the beginning of the argument of the case, was obliged to go to Chambers before the only point on which we took time to consider arose.

The question was whether a composition deed was binding on the plaintiff, who had not assented to it. The same deed had been previously held good by the Court of Exchequer in the case of *Strick v. De Mattos* (1), and the present case was in substance an appeal from that decision.

A great many objections were raised before us, all of which were disposed of in the course of the argument, except the following one. The deed is expressed to be between the debtor, his inspectors, and the persons “who at the date hereof are respectively creditors of the said De Mattos, or who would be entitled to prove under an adjudication of bankruptcy against the said De Mattos on a petition filed on the day of the date of these presents, hereinafter called *the creditors*,” and the different provisions of the deed are in favour of the creditors thus defined.

It was objected that many claims can be proved in bankruptcy which are not strictly debts, but contingent liabilities, with a special machinery provided for their proof, and it was contended that the persons who were entitled to prove such claims were not creditors within the meaning of the 192nd section of the 24 & 25 Vict. c. 134.

My brother Willes entertained some doubts whether this objection was not well founded, and in deference to him we took time to consider. His doubts, I believe, are not yet altogether dispelled, though he does not dissent from our judgment. The other members of the court, including the late Mr. Justice Crompton, whose opinion on the point was very decided, were of opinion, and on consideration my brother Byles and myself still are of opinion, that throughout the bankrupt acts the word “creditor” is used in the sense of a person having a claim which can be proved under

(1) 3 H. & C. 22; 33 L. J. (Ex.) 276.

the bankruptcy, whether it is strictly a debt or not; and we think that in the 192nd section it must be understood to mean all persons who had at the time of the execution of the deed a claim against the debtor, proveable against his estate if he then became bankrupt.

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We therefore think that this objection also fails, and consequently that the judgment must be affirmed.

Judgment affirmed.

END OF MICHAELMAS TERM.

CASES
DETERMINED BY THE
COURT OF EXCHEQUER
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,
IN AND AFTER
HILARY TERM, XXIX VICTORIA.

JOURDAIN v. PALMER.

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Jan. 11.

*Practice—Interrogatories—Common Law Procedure Act, 1854 (17 & 18 Vict.
c. 125) s. 51.*

In an action for a breach of contract, whereby the plaintiff's patent became void, laying as damages loss of profits, the defendant paid money into court, and applied for leave to deliver interrogatories directed to ascertain the probable value of the patent. The application was refused.

Wright v. Goodlake (1) commented on.

THIS was an application by the defendant for leave to deliver interrogatories to the plaintiff, under 17 & 18 Vict. c. 125, s. 51.

The declaration, after stating that the plaintiff was possessed of an invention, set out an agreement of 10th April, 1862, made between the plaintiff and the defendant, by which it was agreed that Jourdain should, at the cost of Palmer, obtain provisional protection and letters patent for the invention; that the letters patent when obtained should be assigned to Palmer; that Palmer should use his best endeavours to promote the adoption of the invention, and make it productive by using it in his own manufactory, and by

granting licences; that Palmer should receive all moneys to become due in respect of the patent, which should be employed, first, in repayment to him of all his expenses, the surplus to be divided equally between Jourdain and Palmer; that if within two months from the date of the provisional protection Palmer should give a written notice to Jourdain of his intention not to proceed, his rights under the agreement should cease; but if he did not give notice he should be bound to pay the costs of the letters patent and specification; but if at any time Palmer should not think it desirable to continue working the invention, or to pay stamp duties becoming due in respect of the letters patent, or to take or defend proceedings at law or in equity for the protection of the patent, and should give six months' notice in writing to Jourdain, he should not be obliged to continue working the invention, or to make any payment or incur expense on account of the patent, but should be bound at his own expense to re-assign the same to Jourdain his executors or administrators on demand. The declaration then alleged that on 10th April, 1862, provisional protection was obtained, and that Palmer did not within two months of that time give notice to Jourdain of his intention not to proceed with the patent, and after the expiration of the two months, and after the obtaining of letters patent, and before the commencement of the suit, it became necessary for the purpose of proceeding with the letters patent on the terms of the agreement, and preventing the avoidance of them under 16 & 17 Vict. c. 5, s. 2, to pay 50*l.* for stamp duty in respect of the letters patent before the expiration of 10th June, 1865, of which the defendant then had notice. Averment of performance of conditions precedent, and that no notice of the defendant's determination not to pay the stamp duty was given to the plaintiff by the defendant in accordance with the agreement. Breach: that the defendant did not pay the stamp duty, whereby the letters patent became void. Averment of damage by loss of profits.

The interrogatories which the defendant asked leave to deliver were, in substance, as follows: Whether the plaintiff had ever made, or caused to be made, any and what quantity of material under the patent? What quantity of such material was then in his possession or power? What quantity (if any) he had disposed

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of, and to whom, and for what consideration, and how much of such consideration had been received by him? Whether he had received any and what samples of material manufactured by the defendant under the patent, and what had become of the same? Whether he constantly exerted himself to the utmost of his ability, from the 10th April, 1862, to the commencement of this action, to obtain orders for material manufactured by the said process; and whether he had been able to obtain any order, and from whom, and for what amount?

Application had before plea been made at chambers before Martin, B., for leave to deliver these interrogatories, and leave had been refused; the defendant having paid 50*l.* into court, and having then again applied at chambers before Channell, B., and been refused, now renewed his application before the court.

Murphy, in support of the application, cited *Wright v. Goodlake* (1), and contended that the defendant was, according to that decision, entitled to have these questions answered, in order to guide him in paying money into court. The questions go to the substance of the plaintiff's claim, which depends upon the value of the patent, and this the defendant says was worthless, and was, for that reason, abandoned by him.

[MARTIN, B. No, for a breach of contract the plaintiff is always entitled to nominal damages, and this touches only the question of amount. *Wright v. Goodlake* (1) was in tort, and is distinguishable on that ground; but if it authorizes such an application as this, the sooner it is overruled the better.]

[CHANNELL, B. You should have applied for particulars of damage.]

Such discovery could be obtained in equity, and if so, it ought to be granted here.

[POLLOCK, C.B. If the plaintiff were seeking to recover an equitable demand against the defendant, arising out of this agreement, and the defendant were to claim an equitable set-off, and for that purpose sought to have an account, in the nature of a partnership account, for moneys included in the agreement, he would probably be entitled to it; but that is widely different from this case.]

(1) 34 L. J. (Ex.) 82.

POLLOCK, C.B. I think my brother Channell was quite right in refusing this application, and I agree with my brother Martin in doubting whether *Wright v. Goodlake* (1) would be followed up on every occasion to which it might be apparently applicable. It is sufficient at present to say of that case that it was an action of tort for infringement of a copyright, whereas the present case is one of contract. Because a court of equity would, under some circumstances and for some purposes, allow such questions as these to be put, it is urged that we ought to allow them in the present action. But it is correctly laid down as an established rule with respect to equitable pleas, that no such plea is good unless it goes to the root of the action, so as to settle all questions raised in it. On the same principle interrogatories ought not to be allowed unless they relate to the substance of the action. Now, in equity such questions as these would be allowed only for the purpose of obtaining accounts, with a view to settle the mutual rights of the parties under the partnership or quasi-partnership, which would have been constituted between the plaintiff and defendant if the patent had been proceeded with, and moneys received under this agreement. But that is not an account which could be taken in this court, nor is the action brought with any such view, but is founded on the breach of the agreement by the defendant. Neither *Wright v. Goodlake* (1), nor the analogy of discovery in equity, will justify this application.

MARTIN, B. The usual rule is, that a party is entitled to discovery as to all matters which relate entirely to his own case, but not as to matters which relate to the case of the other party. The action here is for breach of contract, and the defendant, paying money into court, asks leave to deliver interrogatories which relate only to the plaintiff's case, and which really investigate whether the plaintiff will be able to prove certain facts. It is unfair to call upon him to state his case beforehand, and I think my brother Channell's order quite right.

PIGOTT, B. I think this is a fishing application, made for the purpose of discrediting the plaintiff's case, and I doubt whether the case cited assists the application.

CHANNELL, B. On consideration I adhere to my opinion. The

(1) 34 L. J. (Ex.) 82.

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defendant wishes to interrogate the plaintiff as to the damage sustained by him in consequence of the defendant's breach of contract in not paying a sum of money to a third party. It is quite certain that although the statute has given this court the power of administering interrogatories, yet we should not allow them in a case where the party asking leave would not obtain relief in a court of equity, whose rules are in general taken by us as a guide in determining where they should be allowed. Now I am far from saying that such discovery would not be given in equity in respect of moneys received by the plaintiff in which the defendant had an interest under this agreement; but that is not this case. We must take it as if the plaintiff had replied damages *ultra*, and I cannot see that under these circumstances the discovery asked for would be obtained in equity, or that it is in any way relevant to the substance of the action.

Application refused.

Jan. 16.

ROE v. BRADSHAW.

Bill of sale—Affidavit—Description of grantor's occupation and residence—"Best of the belief" of deponent—17 and 18 Vict. c. 36 (Bills of Sale Act, 1854) s. 1.

An affidavit annexed to a bill of sale described the grantor's residence and occupation to the "best of the belief" of the deponent:—

Held, a sufficient description to satisfy the requirements of 17 & 18 Vict. c. 36, s. 1.

ACTION against the sheriff of the county of Surrey for a false return of *nulla bona* to a writ of *fi. fa.* The defendant paid 15*l.* into court, and the only issue was whether that sum was sufficient to satisfy the plaintiff's claim. The cause was tried before Bramwell, B., at the sittings in London after Michaelmas Term, 1865, when it appeared that before the writ could be executed, the execution debtor had, by a duly registered bill of sale, transferred all his goods within the defendant's bailiwick, except goods to the value of the sum paid into court, to a third person. The affidavit of the attesting witness to the bill contained a statement of the time of the bill being given, and also a description, "*to the best of the belief*" of the deponent, of the residence and occupation

of the grantor. The description was, in fact, a true one. It was objected on the part of the plaintiff that the affidavit of description was insufficient, and that the bill was therefore void against an execution creditor according to the provisions of 17 & 18 Vict. c. 36, s. 1. Assuming it to be void, the plaintiff was shewn to be entitled to 7*l.* in addition to the 15*l.* paid into court. A verdict was entered for the defendant, leave being reserved to move to enter it for the plaintiff for 7*l.* beyond the sum paid into court, on the ground the bill of sale was void as against him.

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Section 1 of 17 & 18 Vict. c. 36 enacts that every bill of sale of personal chattels, or a true copy thereof, and of every attestation of the execution thereof, shall, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale," be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale; otherwise such bill of sale shall . . . as against all sheriffs' officers and other persons seizing any property comprised in such bill of sale in the execution of any process of any court of law or equity, and against every person on whose behalf such process shall have been issued, be null and void.

M. Chambers, Q.C. (*Henry James* with him), moved for a rule pursuant to the leave reserved. The affidavit only describes the residence and occupation of the grantor of the bill "to the best of the belief" of the deponent; and that is not a sufficient compliance with the provisions of 17 & 18 Vict. c. 36, s. 1. *Pickard v. Bretz* (1), *Tuton v. Sanoner*. (2) Perjury could not be assigned on so general a statement. The "best" of a man's belief may mean little better than no belief at all. To allow an affidavit in this form would lead to the making of illusory affidavits.

POLLOCK, C.B. The Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, requires that every bill of sale, and every attestation of the exe-

(1) 5 H. & N. 9; 29 L. J. (Ex.) 18.

(2) 3 H. & N. 280; 27 L. J. (Ex.) 293.

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cution thereof, shall be accompanied by “an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same;” and the question is whether an affidavit made stating the time of such bill of sale, followed by a description of the residence and occupation of the person making the same “to the best of the belief” of the maker of the affidavit—the maker stating it to be so and so—is sufficient. I am of opinion that such an affidavit is a sufficient compliance with the statute. It *does* contain a description of the residence and occupation of the grantor of the bill of sale. But then it is objected that this is only an affidavit of the *best of the belief* of the maker. I think, however, that a man who makes such a statement imports that he is entitled to entertain the belief he expresses, and that we must not take him to mean that the “best” of his belief is no belief at all. When a case arises where such turns out to be the meaning of the man making the affidavit, the Court will be able to vindicate its dignity. The danger suggested by Mr. Chambers is that a man may shelter himself behind a quibble, but I think that would turn out to be a mistake. I am therefore of opinion that the statement in this affidavit, which is really the truth, is sufficient.

MARTIN, B. I am of the same opinion. The question is whether the Bills of Sale Act has been complied with, for we ought not to require more than the act requires. This affidavit *does*, I think, contain a description of the residence and occupation of the maker of the bill, and it is a true description. It seems to me that if we adopted the view urged on us we should have to go the length of holding that no person can attest a bill of sale who cannot give *legal* evidence of the contents of his affidavit, *i.e.* not hearsay evidence; and I am not prepared myself to go that length.

CHANNELL, B. I also think this affidavit sufficient. What is required is, first, that every bill of sale, and every attestation of the execution thereof, shall be accompanied by an affidavit of the time of such bill of sale being made. Now, that point has clearly been complied with. Then, secondly, there is to be “a description of the residence and occupation of the person giving the same;” and I think that this affidavit contains a description of the residence and occupation sufficient under the statute.

BRAMWELL, B. I reserved this point at the trial because the affidavit was the first in this form which had come under my notice. I think that the Lord Chief Baron has indicated the right way of meeting the case. An affidavit cannot be construed to mean more than the belief of the man who makes it. But a man's belief and the best of a man's belief are really the same things. My doubt was whether there might not be opportunity given for making a quibble. It is said that the "best" of a man's belief may be worth nothing. To this the Lord Chief Baron gives the true answer. A man who swears to the "best" of his belief swears that he has a belief. Our decision may perhaps produce some laxity in affidavits, and it was because I felt that, that I thought it right to reserve the point. I am glad to find that the court entertains the same opinion as I entertained at the trial, viz. that the objection is an invalid one.

Rule refused.

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RAMSGATE VICTORIA HOTEL COMPANY LIMITED v. MONTEFIORE.
SAME v. GOLDSMID.

Jan. 17.

Company—Allotment of Shares—Reasonable Time.

The defendant in one of the above actions for non-acceptance of shares, applied for shares on June 8, but no allotment was made till Nov. 23. On Nov. 8, he withdrew his application.

The facts in the other action were the same, except that the defendant had never withdrawn his application:—

Held, that the allotment must be made within a reasonable time, that it was not so made, and, therefore, that neither defendant was bound to accept the shares allotted.

THESE were actions for non-acceptance of shares, and for calls, and cross-actions for recovery of deposit, and for damages for not duly allotting shares, turned into a special case.

The company was completely registered 6th June, 1864. By the 2nd article of association it was provided that the company should continue incorporated, notwithstanding that the whole number of shares in the company might not be subscribed for or issued, and might commence and carry on business when, in the judgment of the board, a sufficient number of shares had been subscribed to justify them in so doing.

The prospectus of the company contained the following words:—

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“Deposit on application 1*l.* per share, and 4*l.* on allotment.” And it was further stated that if no allotment were made the deposit would be returned.

The defendant Montefiore, on the 8th June, 1864, filled up, signed, and sent to the directors the printed form of application annexed to the prospectus, which was as follows:—

“GENTLEMEN,—Having paid to your bankers the sum of 50*l.*, I hereby request you will allot me 50 shares of 20*l.* each in the Ramsgate Victoria Hotel Company (Limited); and I hereby agree to accept such shares, or any smaller number that may be allotted to me, to pay the deposit and calls thereon, and to sign the articles of association of the company at such times and in such manner as you may appoint.”

The defendant had so paid the sum of 50*l.*, and had taken from the bankers the following receipt:—

“Received, the 8th June, 1864, on account of the directors of the Ramsgate Victoria Hotel Company (Limited), the sum of 50*l.*, being the deposit paid in accordance with the terms of the prospectus, on an application for an allotment of 50 shares in the same undertaking.”

On 17th August the secretary made out and submitted to the directors a list of applicants for shares up to that time, in which appeared the name of the defendant for 50 shares. The list was headed “List of subscribers, August 17, 1864.”

On the 2nd November the secretary again submitted a list of subscribers to the directors, but they did not deem it advisable to proceed to an immediate allotment, and entered a minute to that effect. On the 8th November the defendant, having received no communication from the company, withdrew his application.

On the 23rd November the secretary prepared another list of subscribers, including the defendant's name. The directors made the first call, and by their direction the secretary wrote the following letter to the defendant:—

“SIR,—I am instructed by the directors to acquaint you that, in compliance with your application, they have allotted to you 50 shares in this company, and have entered your name in the register of shareholders for the same; and I have to request that you will pay the balance of the first call, as noted below, on or

before the 15th December, to the London and County Bank, 21, Lombard Street, E.C."

The defendant having refused to accept the shares or pay the call, the company brought the present action against him.

It was contended by the company that the last-mentioned list and those previously mentioned, or one of them, constituted a sufficient register of shares within the Companies' Act, 1862.

The directors had entered into an agreement for the purchase of the site of the hotel, paid the deposit, and commenced operations.

The facts with respect to Goldsmid were the same, except that he had never withdrawn his application, nor given any notice of his intention to do so.

Mellish, Q.C. (Digby with him), for the company, contended that, although, in ordinary cases, the assent of both parties, mutually communicated, was necessary to form a contract, yet on the authority of *Ex parte Bloxam* (1), and *Ex parte Cookney* (2), shares might be completely allotted without any communication to the applicant, or acceptance by him; that the facts above stated shewed an allotment made on the 17th of August; but that, if not, the allotment in November was, considering the nature of the contract, made within a reasonable time, and, if so made, the letter of withdrawal was inoperative.

M. Chambers, Q.C. (Cohen with him), for the defendants, were not called on.

THE COURT (POLLOCK, C. B., MARTIN, CHANNELL, PIGOTT, BB.), observed that in both the cases cited, the question was as to the liability of an applicant for shares as a contributory, and they referred to the judgment of Turner, L.J., in *Ex parte Bloxam* (3), as explaining the *ratio decidendi* in that case; they held that there was no allotment till November 23rd, that the allotment must be made within reasonable time, and that the interval from June to November was not reasonable, and therefore gave

Judgment for both the defendants.

(1) 33 L. J. (Ch.) 519, 574. (2) 3 De G. & J. 170; 28 L. J. (Ch.) 12.

(3) 33 L. J. (Ch.) 575-6.

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GRESTY v. GIBSON.

1866
Jan. 18.

Bankruptcy Act, 1861, (24 & 25 Vict. c. 134)—Deed under s. 192—Covenant with all the Creditors—Release.

In a composition deed under s. 192 of the Bankruptcy Act, 1861, made between the debtor of the one part, and all his creditors of the other part, the debtor covenanted severally with all his creditors to pay a certain composition :—

Held, that any creditor could sue on this covenant.

The deed, in consideration of the above covenant, released the debtor from all actions, debts, contracts, &c. :—

Held, that the general words of the release were to be restrained by the general provisions of the deed, and the deed was held valid.

DECLARATION, on a promissory note made by the defendant, with money counts.

Plea 3. That after action an indenture was made between the defendant and divers of his creditors, under s. 192 of the Bankruptcy Act, 1861, setting out the deed with the usual averments, and that “the defendant has been, and is, by means of the premises, since the commencement of this action, released and discharged from the plaintiff’s claim.”

The deed was made between the debtor of the one part, and *all* his creditors of the other part; and, after a recital that it had been agreed that the debtor should pay to his creditors a composition of 5s. in the pound, by three instalments, the debtor “covenanted with the said several creditors, and with each of them respectively, their and each of their executors, administrators, and assigns respectively,” to pay “to the said creditors respectively, or to their respective executors, administrators, or assigns, the said composition of 5s. in the pound,” by instalments as mentioned in the deed.

The creditors absolutely released the debtor from all actions, suits, debts, sum and sums of money, accounts, reckonings, contracts, agreements, promises, bills, notes, judgments, claims, and demands whatsoever, at law or in equity, reserving rights against third persons. And it was declared that the deed was intended to be a deed within the meaning of the Bankruptcy Act, 1861. No consideration for the release was given to the creditors by the deed, except the covenant above mentioned.

Demurrer and joinder.

Nov. 20. *McIntyre*, in support of the demurrer, raised the preliminary objection that the plea was not formally pleaded to the further continuance of the action, and cited *Oppenheimer v. Grieves* (1), and *Morgan v. Harding* (2), but

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[CHANNELL, B. referred to *Johnson v. Barratt* (3), and said that a plea in this form would clearly entitle the plaintiff to costs.]

The objection was then abandoned.

The substantial objections are, first, that the covenant is one on which a non-executing creditor could not sue. It is made with *all* the creditors, but this is too general a term to constitute a class capable of taking a covenant. To make it valid at all it must be restricted to the creditors who execute; but, if it were so construed, the deed would give the non-assenting creditors no consideration for their release, and would further create an inequality between them and assenting creditors. *Ex parte Cockburn* (4), *Chesterfield & Midland Silkstone Colliery Company v. Hawkins* (5), *Benham v. Broadhurst*. (6) Secondly, supposing the first objection to be unfounded, the deed is still unreasonable, both because it gives the debtor an absolute release in consideration only of his covenant to pay a part of what was due from him, and also because the release is in such general terms, that he will be discharged by it from legal liabilities for which he is by the deed under no obligation to pay any composition; the words of the release include "contracts, &c."

Jan. 17. *Holker*, in support of the plea. First, the covenant is one on which any creditor may sue. *Chesterfield & Midland Silkstone Colliery Company v. Hawkins* (5) proceeded on the ground that the deed was expressed to be made only with the executing and assenting creditors, and therefore, by the strict rule of law, that none but parties to an indenture can sue upon it, creditors not executing nor assenting could not sue on the covenant, though expressed to be made with all. But in this case *all* the creditors are expressed to be parties to the deed. *Ex parte Cockburn* (4) was decided on the ground of inequality, those who executed receiving the composition in cash, while the rest obtained only the debtor's promise; what is said there upon

(1) 7 H & N. 533; 31 L. J. (Ex.) 375.

(4) 33 L. J. (Bkr.) 17.

(2) 11 W. R. 65.

(5) 3 H. & C. 677; 34 L. J. (Ex.) 121.

(3) Ante p. 65; note p. 66.

(6) 3 H. & C. 472; 34 L. J. (Ex.) 61.

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the other point is only an obiter dictum. The only question, therefore, on this branch of the argument is whether the parties are sufficiently ascertained; and, on the maxim, *id certum est quod certum reddi potest*, they are so. The word *creditors* ascertains them by description, as in *Sunderland Marine Insurance Company v. Kearney* (1), the co-plaintiff below was allowed to sue as a party interested, on a covenant under seal to make good damage to the subject matter of the policy; and the covenant being clearly several, each creditor has an immediate and independent remedy.

[POLLOCK, C.B. Certainly, if one were to covenant with persons under the description of all the members of a corporation, or of a firm, at a particular time, it would be valid; the only question is whether the description of the covenantees as creditors is not too vague and general. It is quite clear that the covenant is several.]

One difficulty on this branch of the subject is removed by *Whittaker v. Lowe* (2), which decides that secured creditors are to be reckoned. (3) The defendant's view is supported by the judgment of Blackburn, J., in *Dingwell v. Edwards* (4), which was not dissented from on this point by the judges whose opinions were against the deed; and the point is in effect decided in the defendant's favour by *Dewhurst v. Jones* (5), in the judgment of the court delivered by Bramwell, B. Secondly, as to the inadequacy of the consideration, *Johnson v. Barratt* (6) is conclusive in the defendant's favour; see also *Stone v. Jellicoe* (7); and, as to the extent of the release, *Hazelgrove v. House* (8) shews that it will be confined to such liabilities as may be the proper subject of a composition.

McIntyre, in reply. A distinction must be made between a covenant in a deed poll, which may be made with any number of persons, and a covenant in an indenture, which can only be made

(1) 16 Q. B. 925; 20 L. J. (Q. B.) 417.

(2) Ante p. 74.

(3) See also *Woods v. De Mattos*, ante p. 91, which decides that the word *creditors* in 24 & 25 Vict. c. 134, means all persons who could prove in bankruptcy.

(4) 33 L. J. (Q. B.) 161, 167.

(5) 3 H. & C. 60; 33 L. J. (Ex.) 294.

(6) Ante p. 65.

(7) 3 H. & C. 263; 34 L. J. (Ex.) 11.

(8) Law Rep. 1 Q. B. 101.

with persons named as parties. In the cases cited of *Dingwell v. Edwards* (1), and *Dewhurst v. Jones* (2), the point was not argued.

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Jan. 18. The judgment of the Court (Pollock, C.B., Martin, Channell, Pigott, BB.) was delivered by

POLLOCK, C.B. In this case, which was argued before us yesterday, the only point of importance was that which was raised in *ex parte Cockburn* (3), as to the power of creditors to sue on a covenant in this form. On that point we reserved judgment, and we have since found a case of *Lay v. Mottram* (4), lately decided in the Court of Common Pleas. In that case, in answer to an action on bills of exchange, a composition deed was pleaded, which we cannot distinguish from the present one. The Court there held the plea to be good, and gave judgment for the defendant. On the authority of that case we give judgment for the defendant on this demurrer.

Judgment for the defendant.

 PARKER v TOOTAL.

 Jan. 25.

In this case, reported *ante* p. 41, the rule was drawn up in the following form :—"It is ordered that the master review his taxa-

(1) 33 L. J. (Q. B.) 161, 167.

(2) 3 H. & C. 60; 33 L. J. (Ex.) 294.

(3) 33 L. J. (Bkr.) 17.

(4) 19 C. B. (N. S.) 479. In that case the deed was made between the debtors, a surety, and all the creditors; and it recited that the debtors were jointly indebted to the persons and companies whose names or whose trading firms and companies were set out in the schedule (which schedule was intended to include all the creditors of the debtors), in the sums set opposite to each name, firm or company, and upon the several bills of exchange and negotiable securities mentioned in the

schedule (as the debtors did thereby respectively admit and acknowledge, and as the creditors did thereby respectively declare), and that the debtors had agreed to pay a certain composition, and that the creditors had consented to accept such composition, to be secured by the joint and several promissory notes of the debtors and the surety. The deed contained no express covenant, and gave no other consideration to the creditors; and it absolutely released the debtors. The Court referring to *Farrall v. Hilditch*, 5 C. B. (N. S.) 840; 28 L. J. (C. P.) 221, held that the recital created an implied covenant, and upheld the deed.

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tion of the defendant's costs herein, by disallowing the costs of the action, and also the costs of the proceedings in error incurred prior to the entry of the suggestion of the death of the deceased claimant, John Barrow, in Michaelmas Term, 1861."

Cleasby, Q.C., in the course of the term, referring to the above report, applied to have the rule amended, by striking out so much of it as disallowed the costs in error prior to the suggestion. He did not ask to have the case reargued on this point, but only desired the Court to state whether they had in fact meant to disallow these costs.

The Court said they would consider the matter, and on a subsequent day.

Jan. 25. CHANNELL, B., said: In this case, which was an application for an order directing the master to review his taxation, the Court made the rule absolute, and the rule, as drawn up, directed the master to review his taxation by disallowing the costs of the action, and also the costs of the proceedings in error, prior to the entry of the suggestion of the original plaintiff's death. There were three classes of costs before the master: first, the costs incurred in the court below; second, the costs in error before the suggestion; third, the costs in error subsequent to the suggestion. *Mr. Cleasby* thought that the Court only intended to disallow the costs in the court below, and not the costs in error before the suggestion, and he applied to us to amend the rule—not asking us to reconsider the question, but to state what was in fact our intention. We have considered the matter, and read the report of the case, and we think that the rule has been drawn up correctly, and in accordance with the intention of the Court. (1)

(1) The judgment of the Exchequer Chamber having been allowed to go to the House of Lords without raising the question of the liability of Total to any of the costs in error, that point

was not contested on his behalf in this court, and the application was accordingly confined to the costs included in the rule.

NOBLE v. WARD AND OTHERS.

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Jan. 12.*Statute of Frauds (29 Car. 2, c. 3) s. 17—Parol Variation of a Written Contract—Substituted Contract—Rescission.*

The plaintiff made a contract in writing, with the defendant, for the sale of certain goods of more than 10*l.* in value, at specified prices, to be delivered within a specified time. Subsequently and before the time for delivery had arrived, a parol agreement between the parties was entered into, whereby the time for delivery was extended:—

Held, that the subsequent parol agreement was not “good” for any purpose under 29 Car. 2, c. 3, s. 17, and could not operate either as a rescission of the original written contract, or as a new contract for the sale of goods, and that the original written contract might therefore be enforced.

Moore v. Campbell, 10 Ex. 323, followed.

ACTION for non-acceptance of goods. The first count of the declaration stated that it was agreed between the plaintiff and the defendants that the plaintiff should sell and deliver to them, and that they should accept from him, within a certain agreed period, which had elapsed before action, a quantity of cloth at certain prices therefore to be paid by the defendants, and then agreed upon between the plaintiff and the defendants; yet the defendants refused to accept or pay for the cloth, although all things were done, &c., whereby the plaintiff lost the difference between the agreed price and the lower price to which the goods sold fell. The second count was for money payable for goods bargained and sold, goods sold and delivered, and for money due on accounts stated.

The defendants, as to the first count, pleaded (1) *Non assumpsit*. (2) Traverse that the plaintiff was ready and willing to deliver the cloth within the agreed period. (3) That it was one of the terms of the alleged agreement, that the cloth agreed to be sold and delivered should be of the same material, and as well made, as a sample piece then shewn and delivered by the plaintiff to the defendants; and that the plaintiff was not ready and willing to deliver cloth of the same material and as well made as the sample piece. (4) Rescission of the alleged agreement. (5) To the second count, never indebted. Issues thereon.

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The cause was tried before Bramwell, B., at the Manchester Summer Assizes, 1865, when the following facts were proved :—

The plaintiff is a manufacturer, and the defendants are merchants, at Manchester. On the 12th August, 1864, the defendants gave to the plaintiff's agent an order for 500 pieces of 32-inch grey cloth at 38s. 9d., and 1000 pieces of 35-inch grey cloth at 42s. 1½d., the deliveries to commence in three weeks, and to be completed in eight to nine weeks. On the 18th of the same month a second order was given by the defendants for 500 pieces of 32-inch grey cloth at 39s. and 100 pieces of 35-inch grey cloth at 42s. 3d., to be delivered "to follow on after order given 12th instant, and complete in ten to twelve weeks." The plaintiff, on the 10th and 19th September made a first and second delivery on account of the first order. Considerable discussion ensued, both as to the time of delivery and as to the quality of the goods delivered; and eventually, on the 27th September, the plaintiff had an interview with the defendants, at which it was agreed that the goods delivered under the first order should be taken back, that that order should be cancelled, and that the time for delivering the goods under the second order should be extended for a fortnight. Goods were tendered to the defendants by the plaintiff in time either for the fulfilment of the agreement of the 18th August or of that of the 27th September; but the defendants refused to accept them on various grounds—amongst others, on the ground that they were not of the stipulated quality. The plaintiff thereupon brought this action. The declaration was framed so as to fit either the agreement of the 18th August or that of the 27th September. The learned judge directed a nonsuit to be entered, being of opinion that the contract of the 18th August was no longer in existence, the parol agreement of the 27th September having rescinded it; and that the latter agreement could not be resorted to, not being in writing, in accordance with s. 17 of the Statute of Frauds (29 Car. 2, c. 3). That section provides that "no contract for the sale of any goods, wares, or merchandizes for the price of 10l. sterling or upwards shall be *allowed to be good*. . . . unless some memorandum or note in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized."

A rule *nisi* was obtained in Michaelmas term, 1865, for a new trial, on the ground that the plaintiff was entitled to recover on the contract of the 18th August.

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Holker and *Baylis* shewed cause:—1st. The nonsuit was right. The agreement of the 27th September was a material alteration of that of the 18th August, and supported the plea of rescission; *Stead v. Dawber*. (1) But not being in writing, it cannot be “allowed to be good” within the meaning of 29 Car. 2, c. 3, s. 17, as a contract for the sale of goods, though it is good as a rescission of the former contract: *Goss v. Lord Nugent*. (2) In *Moore v. Campbell* (3), which will be relied on for the plaintiff, there was a parol agreement, beneficial to the plaintiff, to alter the place of delivery of goods according to the usage of a particular trade as to delivery, and it was held not to operate as a rescission. Here, however, the substituted agreement contains an alteration so material as to create a new contract. The time, which is of the essence of the contract, is altered by a fortnight. Unless, therefore, there can be no waiver by parol of a contract required by the Statute of Frauds, s. 17, to be in writing, the contract of the 18th August is gone entirely. But there is nothing in sec. 17 to say that a parol contract to abandon or put an end to another shall not be good. The opposite construction might lead to much hardship, for assuming the verbal contract to be valid for no purpose, one party might agree with the other to extend the time for delivery, and then, when it had become impossible to deliver in the time originally fixed, turn round and sue for non-delivery within the *non*-extended time. Secondly, assuming that the contract of the 18th August was still in force, it was not clear that the plaintiff was ready and willing to deliver.

Mellish, Q.C., in support of the rule. As to the second point, the contract of the 18th is vague as to time. The deliveries are to “follow on after order given 12th instant.” Then the first contract is given up, and no complete deliveries really take place under it; but the plaintiff, it is submitted, was at liberty to take the utmost time under it, and then “follow on” with his deliveries under the second. The two contracts, at any rate, will bear this

(1) 10 Ad. & E. 57. (2) 5 B. & Ad. 58. (3) 10 Ex. 323; 23 L.J. (Ex.) 310.

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construction; and if it be the correct one, the plaintiff was ready and willing to deliver in time. Moreover, this objection was not taken at the trial.

[BRAMWELL, B. I think that an irresistible case ought to be shewn to support a nonsuit on a ground not taken at the trial.]

Secondly, on the main question; the agreement of the 27th September was void altogether. The words of sec. 17 of the Statute of Frauds are that no contract shall be *allowed to be good* unless certain requisites are complied with, which have not been complied with here. Ought it therefore to be allowed to be good to rescind a former contract? It should be good for no purpose; *Smith v. Hudson*. (1) The parties certainly never meant to get rid of the contract of the 18th August altogether.

[POLLOCK, C. B. Probably they meant to alter the written contract in one material particular, and to do no more.]

That they cannot do. With regard to *Stead v. Dawber* (2), and *Goss v. Lord Nugent* (3), they only prove what is an undeniable proposition, that the substituted contract cannot be recovered upon. In most cases neither party is prepared to perform the original contract, and therefore the question now raised seldom arises. *Moore v. Campbell* (4) is in point. The pleadings are similar to those in this case. "Another question raised," says Parke, B., "was as to the effect of the alteration by parol of the written contract to deliver goods on the quay, to be weighed by the landing-scales, and substitute a delivery from the warehouse." It was contended that this operated as a new contract, which was necessarily a waiver or discharge of the old one, and being made before the breach of the old contract, supported a plea of rescission. "We do not think," continues the learned Judge, "that this plea was proved by this evidence. The parties never meant to rescind the old agreement absolutely, which this plea, we think, imports. If a new, *valid* agreement, substituted for the old one before breach, would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance of part or all." So here, where there is nothing to shew an intention wholly to

(1) 34 L. J. (Q. B.) 145.

(2) 10 Ad. & E. 57.

(3) 5 B. & Ad. 58.

(4) 10 Ex. 323; 23 L. J. (Ex.) 310.

rescind the contract of the 18th of August, and where there is only an attempt to make a new contract for the sale of the goods, without complying with the provisions of the statute, the plaintiff may, if he pleases, revert to the written contract and recover upon it.

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Cur. adv. vult.

Jan. 12. The judgment of the Court (Pollock, C. B., Bramwell, Channell, and Pigott, BB.) was delivered by

BRAMWELL, B. (1) This case was tried before me at Manchester, and the plaintiff was nonsuited. The case comes before us on a rule to set aside that nonsuit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded, among other things, that the contract had been rescinded, and that the plaintiffs were not ready and willing to deliver. The facts were, that a contract for the sale and delivery of goods from the plaintiff to the defendants, at a future day, was entered into on the 12th of August, which may be called contract A; that another contract for sale and delivery by the plaintiff to the defendants also at a future day was entered into on the 18th of August, say contract B; that before any of the days of delivery had arrived the plaintiff and defendants agreed, verbally, to rescind, or do away with, contract A, and to extend for a fortnight the time for the performance of contract B; that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This, on principle and authority, was a third contract, call it C. It was a contract in which all that was to be done and permitted on one side was the consideration for all that was to be done and permitted on the other. (See per Parke B. in *Marshall v. Lynn*.) (2) It remains to add that the declaration would fit either contract B or contract C, and that goods were tendered by the plaintiff to the defendants in time for either of those contracts. My notes, and my recollection of my ruling, are that contract B was rescinded, and contract C not enforceable, not being in writing. I think that was wrong. Either contract C was within the Statute of Frauds, or not. If not, there was no need for a writing; if yes,

(1) This judgment was read by CHANNELL, B.

(2) 6 M. & W. 117.

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it was because it was a contract for the sale of goods, and so within the seventeenth section of the statute. That says that no contract for the sale of goods for the price of 10*l.* or upwards shall be allowed to be good, except there is an acceptance, payment, or writing. The expression "allowed to be good" is not a very happy one, but whatever its meaning may be, it includes this at least, that it shall not be held valid or enforced. But this is what the defendant was attempting to do. He was setting up this contract C as a valid contract. He was asking that it should be allowed to be good to rescind contract B.

It is attempted to say that what took place when contract C was made was twofold. First, that the old contracts were given up; secondly, a new one was made. But that is not so. What was done was all done at once—was all one transaction, one bargain; and had the plaintiff asked for a writing at the time, and the defendants refused it, it would all have been undone, and the parties remitted to their original contracts.

I think, therefore, that on principle it was wrong to hold that the old contract was gone. *Moore v. Campbell* (1) is an authority to the same effect. It is true that case may be distinguished on the facts, namely, that there what was to be done under the new arrangement in lieu of the old was to be done at the same time, so that it might well be the parties meant, not that the new thing should be done, but if done it should be in lieu of the old. Such an argument could not be used in this case. But it was not the ground of the judgment there, which is that the new agreement was void. The cases of *Goss v. Lord Nugent* (2), *Stead v. Dawber* (3), and others, only shew that the new contract C cannot be enforced, not that the old contract B is gone. I think it was not. Inconvenience and absurdity may arise from this. For instance, if the defendants signed the new contract, and not the plaintiff, the plaintiff would be bound to the old and the defendants to the new. Or, if in the course of the cause a writing turned up signed by the plaintiff, then they could first rely on the old, and afterwards on the new contract. But this is no more than may happen in any case within the 17th section, where there has been one contract only.

(1) 10 Ex. 323; 23 L.J. (Ex.) 310. (2) 5 B. & Ad. 58. (3) 10 Ad. & E. 57.

But then, it was said before us that the plaintiff was not ready and willing to deliver under contract B. Probably not, and he supposed contract C was in force. In answer to this the plaintiff contended before us that this point was not made at the trial, to which the defendants replied,—neither was the point that the old contract was in force. My recollection is so,—that the case was opened and maintained as on the new contract,—but I agree with Mr. Mellish, that a nonsuit ought to be maintained on a point not taken at the trial only when it is beyond all doubt. I cannot say this is. Consequently, I think the rule should be absolute, but under the circumstances the costs of both parties of the first trial ought to abide the event of the second.

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CHANNELL, B. The case, in my brother Bramwell's opinion, turning on what was his own impression, he was desirous that this judgment should be read as his own judgment. But I am authorized by the Lord Chief Baron, and by my brother Pigott, to say that, although I have read it as the judgment of my brother Bramwell, it is a judgment in which we all agree.

Rule absolute.

Attorneys for plaintiff: *N. C. & C. Milne.*

Attorneys for defendants: *Reed & Phelps.*

SPENCER AND HEWITT v. DEMETT.

Jan. 17.

Bankruptcy—Proof—Equitable plea.

It is not a good equitable plea in bar to an action, that the defendant has been adjudicated bankrupt, and that the plaintiff has proved his cause of action under the bankruptcy.

To an action for goods sold, the defendant pleaded equitably, that after the plaintiff's claim accrued, and before writ, she had been adjudicated bankrupt, and that after writ and before declaration the plaintiff Hewitt had been duly appointed assignee, and had proved the debt now sued for, whereby the defendant was discharged, and that the said proof was still in force.

Demurrer and joinder.

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Holl, in support of the demurrer. The 182nd section of 12 & 13 Vict. c. 106, is in the same terms as 49 Geo. 3, c. 121, s. 14, and, therefore, the case of *Harley v. Greenwood* (1), which was decided on that section, is a direct authority against the present plea. In *Elder v. Beaumont* (2), the plaintiff sued on a covenant to pay premiums on a life policy; the debt which was secured by the policy had been barred by the defendant's *certificate*, and, the plaintiff having proved for a part only, the question was whether the whole debt was so satisfied as in equity to vacate the security; the court held that the statement in the plea, that the plaintiff had elected to take the benefit of the petition of bankruptcy in respect of the original debt, was a statement of fact, and on that ground gave judgment for the defendant on the demurrer; but the plea having been also traversed, and disproved on the trial, the plaintiff had judgment on the verdict. That case is therefore no authority against the plaintiffs, but the contrary. The fact that the plea is pleaded equitably can make no difference, for the judgment would none the less be final on such a plea. Although in *Ex parte Diack* (3), it was said that the court would grant a perpetual injunction, if it were satisfied that the debt sued on were the same as that proved, nothing was in fact done, and it is submitted that the injunction would only be until the bankruptcy was superseded. But even if it were otherwise, the court would not allow the present plea, since it would have the effect of putting an end to the debt. The proper mode would have been to apply to stay the action, or to apply in bankruptcy to expunge the proof.

Joseph Brown, Q.C., in support of the plea, admitting that, but for the Common Law Procedure Act, 1854, he would have no *locus standi*, contended that a perpetual injunction would be granted, as said in the case of *Ex parte Diack* (3), and that the plea was therefore good. If the bankruptcy were superseded the plaintiffs might apply to set aside the judgment.

THE COURT (Pollock, C.B., Martin, Channell, and Pigott, BB.) held that the judgment being final, the fact that the plea was pleaded equitably made no difference. The defendant had no right
(1) 5 B. & A. 95. (2) 8 E. & B. 353; 27 L. J. (Q.B.) 25. (3) 2 Mont. & A. 675.

to throw on the plaintiffs the burden of coming to set aside the judgment; and the case of *Harley v. Greenwood* (1) decided the point.

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Judgment for the plaintiffs.

Attorneys for plaintiffs: *Dodd & Longstaffe.*

Attorney for defendant: *Edward Lewis.*

COOK v. JAGGARD AND OTHERS.

Jan. 23.

Will—Construction—Specific devise—Residuary clause—General words.

By a will prior in date to the Wills Act, 1838, the testator, after directing all his debts, &c., to be paid out of his personal estate, proceeded to dispose of his property in these words: "All the rest of my worldly estate, both real and personal, I give, devise, and bequeath as follows:" [then followed two specific devises of certain copyhold premises to Susan W. and the heirs of her body] "and all the rest, residue, and remainder of my personal estate and effects where-soever and whatsoever, and of what nature, kind, or quality soever the same may be, moneys, securities for money, or whatever I may be possessed of or entitled to at the time of my decease, I give and bequeath the same to my said daughter S. W. to and for her own use absolutely":—

Held, that the residuary clause did not pass to the devisees the remainder in fee of the copyhold premises specifically devised to her in tail, and that in respect of the reversion of these copyholds there was an intestacy.

Wilce v. Wilce (7 Bing. 664) commented on.

EJECTMENT by the plaintiff, as customary heir, against John Jaggard and others, for certain copyhold premises in their possession, situated in the parish of Chick St. Osyth, in the county of Essex.

The defendant Jaggard appeared and defended for the whole.

At the trial, before Pigott, B., at the Essex Summer Assizes, 1865, it appeared that the plaintiff claimed as heir-at-law of Nathaniel Cook, who purchased the land in dispute at various periods between the years 1792 and 1803. Cook died in October, 1808, having previously made a will, of which the following are the material parts:—

"I, Nathaniel Cook, &c., publish this my last will and testament in manner and form following: that is to say, first, I desire

(1) 5 B. & A. 95.

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that all my debts, &c., be paid out of my personal estate and effects, and all the rest of my worldly estate, both real and personal, I give, devise, and bequeath as follows [then followed a devise of certain copyholds, in the occupation of J. B., to Susan Cook Westbroom and the heirs of her body, and a second devise of certain other copyholds, in the occupation of the testator, to the same Susan Cook Westbroom and the heirs of her body], and all the rest, residue, and remainder of my personal estate and effects wheresoever and whatsoever, and of what nature, kind, or quality soever the same may be, moneys, securities for money, or whatever I may be possessed of or entitled to at the time of my decease, I give and bequeath the same to my said daughter, Susan Cook Westbroom, to and for her own use absolutely."

Susan Cook Westbroom entered, on the death of Cook, into possession of the estate devised to her. She married Benjamin Jaggard, the father of the defendant Jaggard, and by him had two children. In 1817 she died, and the children died in 1815 and 1821 respectively, thus exhausting the specific devise in tail. Benjamin Jaggard was admitted on his wife's death, by the custom of the manor, as tenant for life, and remained in possession until the 29th of November, 1864, when he died, leaving two sons by a second wife, one of whom was John, the defendant, who continued to occupy the premises, asserting a right to them under the residuary clause of the will of Nathaniel Cook. The question between the parties, therefore, was whether there was an intestacy on the expiration of the estate tail limited by the will as to the copyhold premises devised to Susan Cook Westbroom, or whether the remainder in fee to them passed under the words of the residuary clause.

The learned judge directed a verdict for the plaintiff for the whole of the property claimed, leave being reserved to move to set it aside, and enter a verdict for the defendant, on the ground that, on the true construction of the will of Nathaniel Cook, the whole of his estate in the copyhold premises in question passed to the devisee, and that there was no intestacy as to the remainder after the estate tail created in her favour.

A rule *nisi* having been obtained in Michaelmas Term, 1865, in pursuance of the leave reserved,

M. Chambers, Q.C., and A. L. Smith, shewed cause. 1st. In this case the maxim *noscitur a sociis* is applicable, and the context restrains the words used in the residuary clause to personalty only: *Doe d. Bunny v. Rout* (1); Jarman on Wills, 3rd ed. 681; *Woollam v. Kenworthy*. (2) In *Monk v. Mawdsley* (3) similar words were held to be confined to personal estate, and incapable of extending a previous life interest in realty given by the will. 2ndly. Assuming the words capable of passing real estate, at most only a life interest can pass, there being no words of limitation, nor *clear* intention to dispose of the fee simple. The Wills Act, 1838 (7 Wm. 4, 1 Vict. c. 26, s. 28), directing that a devise without words of limitation shall be construed as passing a fee simple, does not apply, this will having been made prior to that enactment.

Philbrick, in support of the rule. The words in the residuary clause pass the remainder in fee of the copyholds. The clause must be read with the rest of the will, and as if it followed directly on the words at the commencement, "all the rest of my worldly estate both real and personal;" and so reading it, the words "whatever I am possessed of or entitled to" are not limited by the context, and the maxim *noscitur a sociis* does not apply: *Smith v. Coffin* (4); *Hogan v. Jackson* (5); *Doe d. Andrew v. Lainchbury*. (6) *Wilce v. Wilce* (7) is in point. There the testator commenced his will thus: "As touching such worldly property wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in manner following;" and after several specific bequests and devises, concluded, "all the rest of my worldly goods, bonds, notes, book debts, and ready money, and everything else I die possessed of, I give to my son George." It was held that these words passed the lands of the testator not specifically devised.

[CHANNELL, B. In that case there was no preliminary specific devise of the property whereof the remainder was held to pass under the residuary clause. Have you any case where a similar

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(1) 7 Taunt. 79.

(5) Cowp. 299.

(2) 9 Ves. 137.

(6) 11 East. 290.

(3) 1 Sim. 286.

(7) 7 Bing. 664.

(4) 2 H. Bl. 444.

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clause has been held to pass the remainder of the very property specifically devised in a former part of the will?]

No; but the same principle of interpretation must govern in both cases. Again, the intention of the testator in the present case clearly was to dispose of his whole property; but unless the remainder in the copyholds passes by the residuary clause, there is a partial intestacy. As to the second point, there are many instances previous to the Wills Act, 1838, where a fee simple has been held to pass without words of limitation where the intention of the testator was clear. Here there is a clear intention to dispose of his whole estate. *Wilce v. Wilce* (1) is an authority on this point also. There Bosanquet, J., says: "I think that, under the language of the residuary clause, the defendant was entitled to take real estate; and if entitled at all, he was entitled in fee."

[MARTIN, B. That case is no authority to shew that a fee simple passed. All that was necessary to decide was that *some* real estate passed.]

POLLOCK, C.B. I think that this rule should be discharged. Looking at the whole of the will, it is clear that whether or not the testator manifests an intention to part with his whole property, he has not used language capable of effecting that object. The beginning of the will, no doubt, expresses an intention to dispose of the whole property. Then the testator proceeds specifically to devise two copyhold estates to his daughter, Susanna Cook Westbroom, and the heirs of her body, and then follows the residuary clause. The whole of this clause appears to be confined to personalty, of which the testator enumerates the various kinds, *e.g.* moneys and securities for money. Then come the words "or whatever I may be possessed of or entitled to" following the description given of the property bequeathed as "moneys, &c.," and coupled with that description by the word "or." That, I think, shews that the words refer to property *ejusdem generis* with "moneys, &c.;" and it may be observed also that the testator uses the word "bequeath." In *Wilce v. Wilce* (1) the words were, "*and everything else I die possessed of,*" thus making,

(1) 7 Bing. 664, 675.

as it were, a new head of property. This residuary clause, therefore, in my opinion, only applies to personal property; but assuming the contrary, it may be observed that *Wilce v. Wilce* (1) really only decided that *some* real property passed under the residuary clause, and not that a fee simple passed. The present case, then, is distinguishable from that one, and is rather governed by *Monk v. Mawdsley*. (2) I think the whole tenor of the will shews that the residuary clause applies to personal estate only.

MARTIN, B., concurred.

CHANNELL, B. I am of the same opinion. It has been argued that the words in this residuary clause pass an estate in fee in the copyhold premises, but I do not think they can be held to do so. At first I thought the case of *Wilce v. Wilce* (1) in point as to the fee passing, but, on careful consideration, it does not seem to be so. When we look at the question stated for opinion there, it is whether a certain estate passed to the tenant either in fee simple or for life, and it was not necessary to say in the result which of the two estates the plaintiff took. All that that decision settles is that, under the words used, some realty passed. It is true that in the present case the will shews an intention to dispose of the whole property, and not to die intestate as to any part of it; but although this may assist the construction contended for, it does not by itself make it the right one. It seems to me that the case of *Monk v. Mawdsley* (2), alluded by the Lord Chief Baron, is in point, and that this rule should be discharged.

PIGOTT, B., concurred.

Rule discharged.

Attorneys for plaintiff: *Treherne & Co.*

Attorneys for defendants: *N. C. & C. Milne.*

(1) 7 Bing. 664.

(2) 1 Sim. 286.

Jan. 25.

DIAMOND v. SUTTON.

Practice—Writ for service out of the jurisdiction under s. 18 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.)

A writ having been issued for service out of the jurisdiction under 15 & 16 Vict. c. 76. s. 18, the defendant applied on affidavit to set it aside, on the ground that the cause of action did not arise within the jurisdiction; and the Court not being satisfied that the plaintiff did not intend to sue for matters not arising within the jurisdiction, made an order to set aside the writ, unless the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction and to confine himself to that cause of action.

THIS was an application to set aside a writ issued for service out of the jurisdiction, under 17 & 18 Vic. c. 125, s. 18.

The defendant, without appearing to the writ, applied to Martin, B., at Chambers to set it aside, on the ground that there was no cause of action arising within the jurisdiction. In his affidavit in support of the application, he stated that before being served with the writ he had received two letters from the plaintiff's attorney, demanding an apology for certain statements contained in a newspaper called the *Photographic Notes*; that from that circumstance he believed that the damages claimed in the writ were in respect of such statements; and that, save as above mentioned, he had never had any transactions with, or in relation to, the plaintiff, nor heard any alleged, from which any cause of action could arise; and that none such had been alleged to have arisen save as aforesaid; that he then resided, and had for eighteen years previous continuously resided, in Jersey, out of the jurisdiction; that the *Photographic Notes* were wholly edited and printed at St. Heliers, in Jersey, and were also published there; that some copies of them were sent to England for sale, and were from time to time sold here; and that he was not the proprietor, nor part proprietor, nor the publisher of the newspaper.

The affidavit in answer made by the plaintiff's attorney stated, that the action was brought for a libel contained in certain numbers of the *Photographic Notes*, and also for a libel contained in a

letter written in Jersey by the defendant, and sent by him through the post to, and received by, the plaintiff's attorney in London, which letter was also published in the *Photographic Notes*. The letter, and the numbers of the *Notes* in question (being some of the copies circulated in England), were made exhibits, and it appeared from them, and it was stated in the affidavit, that the *Notes* were also published in London by Sampson Low & Co. (bearing their name instead of that of the Jersey publisher), that they bore the name of the defendant as editor, and were registered for transmission abroad; and the affidavit also stated the belief of the deponent, that their sale and circulation in Jersey was very limited compared with that in England and elsewhere. In one of the numbers of the *Notes* which was made an exhibit, the following words occurred in an editorial article:—"As this, unfortunately, is the only independent and plain-spoken journal *in England*."

The substance of the alleged libel contained in the *Notes* was, the imputation of corrupt motives to the plaintiff in his conduct as a juror appointed to award a medal for photographic lenses; and the letter sent to the plaintiff's attorney was in substance an attempt to justify the charge.

The learned Baron offered to dismiss the application if the plaintiff would give an undertaking to prove a cause of action arising within the jurisdiction, and to confine himself to that cause, and on this being declined, he referred the matter to the Court.

Jan. 25. *J. O. Griffiths* moved, accordingly, to set aside the writ. This course is necessary, since appearance to the writ would waive the objection to the jurisdiction, *Forbes v. Smith* (1), and the application is sanctioned by *Binet v. Picot*. (2) It is doubtful whether the alleged libel is not within the bounds of legitimate comment on a public matter; it is at least very doubtful whether the cause of action (if any) arose within the jurisdiction. This being so, the plaintiff ought not to be allowed to compel the defendant's appear-

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(1) 10 Ex. 717; 24 L. J. (Ex.) 167.

(2) 4 H. & N. 365; 28 L. J. (Ex.) 244.

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ance without giving some security that, after having done so, he will not in his declaration state, or in his evidence prove, some cause of action which did not arise within the jurisdiction, and which by itself would clearly not have entitled him to issue the writ.

[MARTIN, B. I thought there was clearly a publication here, but that the plaintiff ought not to be at liberty to sue for other matters under cover of this cause of action, otherwise he might bring the defendant here on a bill of exchange, and then sue him for an assault in Jersey.]

Day showed cause against the rule. The application is premature. If the cause of action did not arise within the jurisdiction the defendant need not take any notice of the writ; the plaintiff must then, under s. 18, apply to a judge for leave to proceed, and he must, on doing this, satisfy the judge by affidavit that a cause of action arose within the jurisdiction. If, then, he afterwards in his declaration went beyond the cause of action so shown by affidavit, the defendant might apply to strike out the additional matter; or if in his evidence he failed to show that the cause of action did in fact so arise, it would be a matter for the judge at the trial, or it might be ground for an application to the discretion of the Court to set aside a judgment so obtained. But upon the materials before the Court there is abundant evidence of a cause of action so arising, and the plaintiff, showing this, is entitled to his writ.

[MARTIN, B. But for the act, the plaintiff could not sue at all; the act allows him to sue a defendant residing out of the jurisdiction for acts committed here; but it is an abuse of the act if, under its powers, he brings the defendant here, and then includes in the same action matters occurring elsewhere, and for which the act does *not* give him power to sue; and the defendant is entitled to ask for protection against this abuse.

[CHANNELL, B. The word "satisfied" in s. 18 seems to give a kind of discretion to the judge; it is true that this is not an application for "leave to proceed" under that section, but in its jurisdiction over its own process the Court is, I think, entitled to

exercise a similar discretion, in order to be satisfied that that process will not be abused. I see no reason why we should be satisfied, if the plaintiff refuses to give the undertaking.]

Per curiam.—(POLLOCK, C.B., MARTIN, CHANNELL, and PIGOTT, BB.)

Rule absolute to set aside the writ unless the undertaking were given by Monday (Jan. 29). (1)

Attorney for Plaintiff: *W. W. King.*

Attorneys for Defendant: *Hancock, Saunders, & Hawksford.*

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ALEXANDER AND ANOTHER v. JONES.

Jan. 30, 31.

Costs—Concurrent Jurisdiction—Dwelling place—County Court—9 & 10 Vict. c. 95, s. 128.

A person who has no permanent place of abode “dwells,” within the meaning of 9 & 10 Vict. c. 95, s. 128, at the place at which he may be *temporarily* residing.

THIS was an application by the plaintiffs for the costs of an action brought by them against the defendant in this court, to recover the sum of 36*l.* 7*s.* 5*d.*, due for work done and materials provided, &c. The defendant paid 15*l.* 7*s.* 6*d.* into court, which the plaintiffs accepted in full satisfaction of their claim. The amount recovered being less than 20*l.*, an application was made at chambers under 15 & 16 Vict. c. 54, s. 4, to Martin, B., for an order for the payment of the plaintiffs’ costs, on the ground that the superior courts had concurrent jurisdiction with the county courts, because the parties “dwelt” (within the meaning of 9 & 10 Vict. c. 95, s. 128) more than twenty miles apart, and the cause of action did not arise either wholly or in any material point within the district in which the defendant dwelt or carried on business. The learned Judge having declined to make the order, a rule *nisi* was obtained (January 23), calling on the defendant to

(1) The undertaking was afterwards given by the plaintiff’s attorney, and was in this form:—“I hereby undertake on the part of the plaintiff, to prove a cause of action has arisen within the jurisdiction of this Court, against the above-named defendant (who is a British subject, and resides at Jersey), pursuant to the 18th section of the Common Law Procedure Act, 1852.”

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shew cause why the plaintiffs should not recover their costs, and why the master should not tax the same.

The facts of the case, as they appeared from the affidavits, were as follows :—

The plaintiffs, at the time of the commencement of the action, resided and carried on business at Bristol, within the jurisdiction of the Bristol county court, and at the same time the defendant was residing at Garthbeibio Rectory, near Welchpool, within the jurisdiction of the Montgomeryshire county court and more than twenty miles from the plaintiffs. The cause of action arose at Bristol. The writ in the action was issued on the 29th of November, 1864. Up to the 10th of the previous month the defendant's place of abode had been at the Royal Hotel, Clevedon, within the jurisdiction of the Bristol county court. He had lived and carried on business there for three years and upwards previous to that day, when he sold off his business and left Clevedon. From the 10th to the 21st of October he stopped at an hotel in Bristol, and then went on a visit to a brother-in-law at Garthbeibio. Whilst living there he received, on the 18th of November, a demand from the plaintiffs for the amount alleged to be due, and on the 6th of December he was, whilst on his way back to Bristol, served at Welchpool with the writ in this action. Since the 10th of October the defendant had never returned to live at Clevedon, and was not shewn to possess a permanent abode either there or anywhere else.

The 9 & 10 Vict. c. 95, s. 128, enacts that “all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record, where the plaintiff *dwells* more than twenty miles from the defendant, or where the cause of action does not arise wholly or in some material point within the jurisdiction of the court within which the defendant *dwells*, or carries on his business, at the time of the action brought may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed.”

The 13 & 14 Vict. c. 61, s. 11, deprives a plaintiff recovering in the superior courts a sum not exceeding 20*l.* in actions of contract, of his costs; but by 15 & 16 Vict. c. 54, s. 4, power is given to the

Court or a Judge at chambers to make an order entitling the plaintiff to costs, upon his making it appear that his action was brought for a cause where, under the 9 & 10 Vict. c. 95, s. 128, the superior courts have concurrent jurisdiction.

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H. Matthews shewed cause. The *onus* of proving that the superior courts have concurrent jurisdiction lies on the plaintiffs; but here they offer no proof that the defendant “dwelt,” within the meaning of 9 & 10 Vict. c. 95, s. 128, anywhere but at Clevedon, within the jurisdiction of the Bristol county court. The defendant was merely a visitor at Garthbeibio, and had acquired no permanent residence there, *Butler v. Ablewhite* (1); dissenting from *Bailey v. Bryant* (2), and followed by *Pigrim v. Knatchbull*. (3) In *Macdougall v. Paterson* (4), a man having his permanent residence at one place, and a lodging for a temporary purpose only at another, was held not to “dwell” at the latter place.

[CHANNELL, B. There the defendant maintained his permanent residence whilst he was in the occupation of the lodging, but here the defendant abandoned his residence at Clevedon altogether.]

That is so; but here, although there is no double residence, in the absence of proof that the defendant has acquired a permanent abode elsewhere, he must be taken still to reside at Clevedon, his last known place of permanent residence.

Lumley Smith, in support of the rule. The defendant left Clevedon before the issue of the writ without any intention of returning. Thus he lost his residence there and had, at the time of action brought, no place of residence at all, except at Garthbeibio. It is said that he was only on a visit there, and that, his residence being merely transitory, he cannot be held to “dwell” there within the meaning of the 9 & 10 Vict. c. 95, s. 128; but where a man has abandoned his permanent abode, and is not shewn to have settled anywhere else, his “dwelling” is at the place in which he happens temporarily to be. In all the cases cited the defendant had two residences, one permanent and one temporary, but here he had only the latter. Having no fixed abode, therefore, he was properly sued in the superior court, *Rolfe v. Learmonth* (5); and in order to

(1) 6 C. B. (N. S.) 740; 28 L. J. (C. P.) 292.

(2) 1 E. & E. 340; 28 L. J. (Q. B.) 86.

(3) 34 L. J. (C. P.) 257.

(4) 11 C. B. 755; 21 L. J. (C. P.) 27.

(5) 14 Q. B. 196; 19 L. J. (Q. B.) 10.

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deprive the plaintiffs of costs he ought himself to have shewn affirmatively either that he did "dwell" within twenty miles of the plaintiffs, or else that the cause of action arose within the jurisdiction of the Montgomeryshire county court.

Cur. adv. vult.

Jan. 31. The judgment of the Court (Pollock, C.B., Martin, Channell, and Pigott, BB.) was delivered by

MARTIN, B. We have had an opportunity of conferring with some of the judges of the other courts as to this case, and are now of opinion that the plaintiffs are entitled to costs. The facts are, that both the plaintiffs and the defendant had until recently resided at Clevedon, within the jurisdiction of the Bristol county court; but the defendant had, at the time of action brought, left Clevedon so far as any permanent dwelling was concerned. He was visiting his brother-in-law at a place out of the jurisdiction of the county court, but had not acquired any permanent dwelling-place there, and in fact had no dwelling-place except his brother's house. He was there served with a writ issuing out of a superior court, and the question is, whether the plaintiffs are entitled to their costs of action on the ground that the case is one in which a superior court has a concurrent jurisdiction with a county court. On the best consideration we can give to the subject, we think that they are entitled to their costs. It is to be observed that jurisdiction is given to the county court by s. 60 of 9 & 10 Vict. c. 95, which provides that a summons may issue in any district in which the defendant shall dwell or carry on his business at the time of action brought; but it is only by leave of the court for the district in which the defendant shall have dwelt or carried on business within six months before the time of action brought, or in which the cause of action arose, that a summons may issue in either of the last-mentioned courts. Then s. 128 provides that where actions might before the act have been brought in one of the superior courts, there, if the plaintiff dwells within twenty miles from the defendant, or if the cause of action did not wholly, or in some material point, arise within the jurisdiction of the court within which the defendant dwells or carries on business, the action may be still brought in a superior court. We think that, if this

defendant really had no dwelling-place, except that he dwelt as a guest with his brother-in-law in Montgomeryshire, he must be taken to dwell at the place where he was then abiding, though it may not have been his own house, and though such an abode might not constitute a dwelling if he had retained a permanent residence. We think, therefore, that the plaintiffs have brought themselves within the terms of s. 128, and the rule must be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Clarke, Woodcock, & Ryland.*

Attorneys for defendant: *White & Sons.*

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BAXENDALE AND OTHERS v. LONDON AND SOUTH WESTERN
RAILWAY COMPANY.

Jan. 22, 31.

Railway—Carrier—Inequality of Charge.

The defendants, a railway company, were incorporated by an Act (4 & 5 Wm. 4, c. lxxxviii.), which contained an *equality clause* (s. 158) in the usual terms.

The defendants were in the habit of charging to the public on any consignment of goods made to one person, at the same time, though consisting of several distinct parcels, a tonnage rate on the aggregate weight of the whole:—

Held, that the fact that, of goods so consigned at the same time to one person, and distinctly addressed to him, some articles had also been written conspicuously upon them the names of persons to whom the consignee intended to deliver them, did not entitle the defendants to charge separately for those on which such names were different. Therefore the plaintiffs, who were carriers, were held entitled to recover the difference between sums paid under protest on goods so consigned and addressed by them to themselves, but charged for separately on account of such second name appearing on them, and the amount which would have been payable on the aggregate weight of the consignment.

The defendants, in addition to their business of carriers by rail, carried on the business of common carriers off their line. They charged an equal rate to all the public for carriage on their line between their termini. They also undertook to collect at one terminus, to carry on their line, and to deliver at a place distinct from, and at some distance beyond, their other terminus; and for this they charged a through rate to all the public alike:—

Held, that the carriage beyond the second terminus was not auxiliary to their business as railway carriers, but was done by them in their business as common carriers generally, and that the plaintiffs were not entitled to deduct the cost of this carriage, and of collection at the first terminus, from the through rate, and to claim to have their goods carried between the termini for the difference.

DECLARATION, containing counts for work done, money paid, money received, and on accounts stated.

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Pleas, 1. Payment into court of 9*l*. 2. To the residue of plaintiffs' claim, never indebted. *Issue.*

At the trial of the cause before Martin, B., at the sittings at Guildhall, after Trinity Term, 1864, a verdict was entered for the plaintiffs, subject to a special case, which stated as follows:—

The plaintiffs are common carriers, conveying goods to and from various parts of England, and employing various railway companies in their carriage.

The defendants' railway runs (amongst other places) from Nine Elms station, London, to Guildford and to Southampton. By the act which incorporated them, 4 & 5 Wm. 4, c. lxxxviii., it is provided (s. 149) that they may take tonnage rates for certain goods at 3*d*. per ton per mile, for certain other goods at 6*d*. per ton per mile. By s. 155, they may make orders for fixing the sums to be charged by the company for small parcels not exceeding 500 lbs. weight, and may from time to time vary and repeal the same, "provided always, that the provisions hereinbefore contained as to parcels shall not extend to goods, articles, matters, and things sent in large aggregate quantities, although made up of separate and distinct parcels, but only to single and undivided parcels."

By s. 156, the company are authorized to carry on their railway all such goods, &c., as shall be offered to them for that purpose, and all such persons as shall apply to be carried along the said railway or any part thereof, and to demand for such carriage, in addition to the usual rates and tolls by the act authorized to be charged and received, such sums of money as the company or directors may from time to time fix and require.

By s. 158, "it shall be lawful for the said company, from time to time, and so often as they shall think fit, to reduce all or any of the rates, tolls, or sums by this act authorized to be taken, and afterwards, from time to time, again to raise the same, or any of them, so that the same respectively shall not at any time exceed the amount by this act authorized. *Provided always*, that the said company shall not partially raise or lower the rates, tolls, or sums payable under this act, but all such rates, tolls, and sums shall be so fixed as that the same shall be taken from all persons alike, under the same or similar circumstances."

The defendants carry on the ordinary business of a railway

company upon their line, and also carry on the business of common carriers between the stations mentioned above and the other stations upon their line, and also between their several stations and places beyond the limits of their line.

The grounds of complaint alleged by the plaintiffs against the defendants, and in respect of which this action was brought, were in respect of,

1. Overcharges upon consignments of goods, by charging for their carriage rates according to the weight of packages contained in these consignments taken separately, instead of a tonnage rate upon the whole of the consignments by the plaintiffs of the same class of goods.

2. Overcharges in not allowing to the plaintiffs a sufficient deduction or rebate for the collection, delivery, and cartage of goods, both in London and in the country, when those services were not performed by the defendants.

3. Overcharges, by charging upon goods carried for the plaintiffs by the defendants, from Nine Elms to Southampton station, thence to be forwarded by the plaintiffs to the Isle of Wight, rates which are higher than those charged to other persons under the same or similar circumstances.

The facts were as follows :—

As to the first claim—The defendants are in the habit of charging for goods carried by them on their line, upon goods weighing over 1 cwt., a tonnage rate, and upon articles under that weight, a small parcels rate, which is considerably higher than the tonnage rate.

When goods are delivered to the defendants for carriage by one person, in a single consignment, at one and the same time, and are addressed to the same consignee, the defendants are in the habit of adding together the weight of all such small packages under 1 cwt., and charging for them upon their aggregate weight.

The plaintiffs are in the habit of sending by the defendants, from one station on their line to another, consignments of goods, each consignment frequently consisting of a number of small parcels. These goods are delivered by the defendants to the plaintiffs at the station whence they are to go, directed and consigned to the plaintiffs at the station to which they are to be carried, and

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where they are to be delivered to the plaintiffs; and at such last-mentioned station are received by the plaintiffs from the defendants. With each consignment the plaintiffs deliver to the defendants a ticking-off note, containing the name of the plaintiffs' firm as the consignors, and also as the consignees of the goods, the description (but not the weight) of the goods, and the station to which they are to be carried. Each package is labelled with a label, in this form, "PICKFORD & Co., GUILDFORD STATION," printed in plain letters, and many of the packages have in addition, conspicuously shown, the names and addresses of the persons to whom the plaintiffs intend to deliver them, according to the directions of their customers. When goods are delivered by the plaintiffs to the defendants, to be carried and delivered by the defendants for the plaintiffs to persons other than the plaintiffs, the names of such other persons are inserted as consignees in the consignment note or declaration, and the goods are addressed to them only, without the above-mentioned label.

Down to 29th February, 1864, the defendants charged a tonnage rate on the aggregate weight of consignments labelled, directed and consigned to the plaintiffs as above-mentioned; but on and after the 1st March, in that year, the defendants, in pursuance of a notice previously given to that effect, altered the system, and charged the plaintiffs separately for each package contained in each consignment so labelled, directed, and consigned, at the tonnage rate or small parcels rate, according to the weight of each package singly, wherever the names of the parties to whom the plaintiffs intended to deliver them appeared on the packages; except that where the same name appeared on two or more packages in the same consignment they charged the tonnage rate upon the aggregate weight of these packages. No difference was made by the defendants in thus charging the plaintiffs, and in charging any others of the public who sent goods under similar circumstances.

Various sums had, between the 1st and 26th March, 1864, been charged by the plaintiffs to the defendants, according to the altered system, for goods so labelled, directed, and consigned as above-mentioned, which sums the plaintiffs had paid under protest; and the difference between these sums and the tonnage rate on each consignment, the plaintiffs now sought to recover.

As to the second claim,—the principle of which was settled by *Re Baxendale v. Great Western Railway Company* (1), and *Re Gar-ton v. Great Western Railway Company* (2), the findings of the special case shewed that a sufficient deduction had not been made, and that part of the case was accordingly abandoned on the argu-ment by the counsel for the defendants.

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As to the third claim,—the plaintiffs, in the course of their busi-ness as carriers, are in the habit of carrying goods for their cus-tomers from London to Cowes and Newport, in the Isle of Wight. In so doing they make use of the defendants' line from Nine Elms station to Southampton station, where the goods are consigned to themselves, and whence they themselves carry them on to Cowes and to Newport. For the carriage of the goods between the sta-tions, the defendants charge them and the rest of the public alike, 11s. 8d., 16s. 3d., and 19s. 7d. per ton, according to the class of the goods.

The defendants, by arrangements with owners of steamboats and sailing-vessels, in their capacity of carriers, themselves also carry goods by their railway from London to Cowes and Newport, charging 20s. and 26s. 8d. per ton, according to the class of the goods. These charges include collection in London, and cartage to Nine Elms, conveyance on the line thence to Southampton station, carriage by tramway from that station to the wharf, wharf dues, and carriage by boats from Southampton to Cowes and New-port, but *not* delivery beyond the quays at Cowes and Newport.

The actual cost to both plaintiffs and defendants, of collection and cartage to Nine Elms, is 5s. per ton. The actual cost to the plaintiffs, and the fair market price of the conveyance of such goods from Southampton station to Cowes and Newport, is 8s. per ton. The actual costs to the defendants of the same transit is 5s. 4d. per ton. The plaintiffs therefore alleged that the actual charge made by the defendants to their Cowes and Newport cus-tomers, for the carriage of their goods of the first class above men-tioned from Nine Elms to Southampton station, was only 7s. per ton, (*i.e.* 20s. *minus* 5s. and 8s.) and claimed to have their own goods carried at that rate; and having, between January 1 and

(1) 5 C. B. (N. S.) 336, 356; 28
L. J. (C. P.) 81.

(2) 5 C. B. (N. S.) 669; 28 L. J.
(C. P.) 158.

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March 26, 1864, sent by the defendants' line from Nine Elms to Southampton, goods consigned to themselves at Southampton station (intended for Newport and Cowes, but not so declared), and having paid for their carriage, under protest, at the rates above-mentioned, they now claimed to recover the difference between the amount so paid and a charge at the rate of 7s. per ton. (1)

The question for the opinion of the Court was,—whether the plaintiffs were entitled to recover from the defendants the before-mentioned sums, or any and what part thereof.

Jan. 22. *Bovill, Q.C. (C. Pollock with him)*, for the plaintiffs. As to the first point, there is a clear inequality in charging separately for parcels in one consignment, labelled in the manner described in the special case. The case finds that the company charge to the rest of the public a tonnage rate on each consignment for the same consignee, although made up of several parcels; but with respect to consignments made by the plaintiffs to themselves, the company claim to examine the other names and addresses written on the parcels, and to charge as though these were the names of the consignees. But it is clear that they have no concern with those persons; they could not legally deliver to them, nor to any other persons than the plaintiffs, nor do they pretend to have such a right. The names are on the same footing as private marks, containing a direction to the plaintiffs themselves, but as immaterial to the defendants as the colour of the paper. The ticking-off note itself, naming the plaintiffs both as consignors and consignees, constitutes the consignment note, as much as if the separate parcels were enclosed in one piece of canvas, or connected by a string, and brings the case within section 149; but it is not necessary for the plaintiffs to contend this, for the case finds that the defendants take from others in this way, and by the equality clause the plaintiffs are entitled to be placed in the same position. The principle is settled by *Pickford v. Grand Junction Railway Company* (2), *Crouch v. Great Northern*

(1) There was a further statement but this was not alluded to in the argument in the case relating to special contracts, arguments or the judgment.

(2) 10 M. & W. 399.

Railway Company (1), and *Sutton v. Great Western Railway Company*. (2) The case does not find that any additional trouble or risk is caused to the company by the goods being sent in this mode.

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As to the third point, this is, in fact, the same question as the second (3); it is an attempt to compel the payment of a delivery charge. In order to ascertain what the defendants ought to charge between London and Southampton, the charges for services of collection and delivery off the line at both ends are to be deducted; and there can be no difference between such services rendered, for instance, between Camden Town and Southwark, and similar services performed between Southampton and Cowes; it can make no matter whether the place of destination is this side or the other of a piece of water, nor, again, whether it is reached by a bridge or a boat.

[CHANNELL, B. No case has expressly gone so far as to say that when the charge on the line is the same, the railway company may not compete in through fares to places off the line, beyond the limits of their ordinary delivery.

MARTIN, B. Do you insist that between two stations on the defendants' line you could compel them to regulate their fares by an average of the distance all along the line? And what difference does it make that this place is beyond the line? Because they compete with you beyond the line, and succeed in carrying at a cheaper rate, can you insist on a deduction of the amount it costs you?]

It is not necessary to contend that the amount which it costs the plaintiffs should be deducted, although that is found to be the fair market price; even at their own rate of expense they do not make a sufficient deduction, for the cost per ton at the London end is found to be 5s., and at the Southampton end 5s. 4d.; and if these sums be deducted from the through rate of 20s., it will leave only 9s. 8d. instead of 11s. 8d. for the transit from Nine Elms to Southampton.

[PIGOTT, B. The plaintiffs must shew that the charge made to them is not the same as that made to other persons under the

(1) 11 Ex. 742; 25 L. J. (Ex.) 137.

(2) 3 H. & C. 800.

(3) The second point being abandoned as above-mentioned was not argued.

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same or similar circumstances; but how do they shew that? To be in the same circumstances they must go to Cowes; but, in fact, they only go to Southampton. Is it not similar to the case of fares, say for instance, from London to Reading or to Brighton, lower than fares to intermediate stations?]

The fact that the transit there is entirely on the line is the essential difference; there is no competition in such a case; but off the line where competition exists, the effect of such charges as the present is to create an inequality, and to give the company a monopoly in a business foreign to the purpose of their constitution: see per Cockburn, C.J., in *Re Baxendale v. Great Western Railway Company* (1); *Same v. Same* (2); *Garton v. Bristol and Exeter Railway Company*. (3)

C. W. Wood (*Mangles* with him) for the defendants. First, as to the third point, the principle of all the cases decided on this subject is inequality, and no inequality is shewn. The complaint of the plaintiffs is not that they are charged more than the rest of the public from Nine Elms to Southampton station, nor that they are charged more than the rest of the public from London to the Isle of Wight, but simply that the defendants carry goods for other persons (as they would do for the plaintiffs) to another place off the line, at a rate lower in proportion than their charge for part of the distance. It is not disputed that they have a right to carry to that place, and the case is therefore in reality the same as that suggested by Martin and Pigott, BB., which was decided in favour of the company in *Re Jones v. Eastern Counties Railway Company* (4); see also *Hozier v. Caledonian Railway Company* there cited. (5) The cases cited upon the other side were all cases in which there was a through charge, including the cost of collection and delivery at the place to which the line went, and they decided only that the company were not entitled to charge, under the name of railway carriage, for services not performed on the line, in such a manner as to lay a burden upon those who did not wish to avail themselves of those services. Now, as to

(1) 5 C. B. (N. S.) 355; 28 L. J. (C. P.) 81.

(2) 14 C. B. (N. S.) 1; 16 Ib. 137; 32 L. J. (C. P.) 225; 33 Ib. 197.

(3) 6 C. B. (N. S.) 639; 28 L. J. (C. P.) 306.

(4) 3 C. B. (N. S.) 718.

(5) 17 Sess. Cas. (2nd S.) 302.

goods consigned to Southampton only, no such services are performed for any of the public, and therefore the application of those cases fails. But as to goods which the defendants carry to Newport, they go to Southampton only as they do to any intermediate station in the course of their transit. The quays at Cowes and Newport are the places which respectively correspond to the London terminus, and to give the cases cited a *primâ facie* application even, it would be necessary to shew a charge for delivery within *that* district included in the through rate, in the same manner as a charge for delivery in London was included in the through rate there. But there is no such charge, nor indeed any such delivery; and for the services which are rendered between Southampton and the Isle of Wight in the course of the through transit, the plaintiffs are not compelled to pay, but may, as in fact they do, have their goods carried to Southampton at the same rate as the rest of the public. If they can establish the present claim, no limit can be fixed where a similar claim would not prevail, and wherever the company take goods off the line in their business of common carriers, the plaintiffs will be entitled to interfere with their charges. But if they could succeed at all, they could, at any rate, claim only a deduction from the through rate, of so much as it actually costs the defendants to perform the additional transit. The notion of a market value, which is fixed by reference to their inferior appliances, is an absurdity, and the effect of calculating the proper charge by such a standard would only be to benefit them at the expense of the public: *Garton v. Bristol and Exeter Railway Company* (1), per Cockburn, C.J., and Crompton, J.

Secondly. As to the first point, the cases of *Baxendale v. Eastern Counties Railway Company* (2); and *Garton v. Bristol and Exeter Railway Company* (1), are almost decisive in the defendant's favour. It is a materially different question from that decided in the cases of packed parcels, for there the element was wanting that each parcel was separately addressed to the ultimate consignee. In charging according to the altered system, the plaintiffs are in fact treated in the same way as the rest of the public, as the case specifically

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(1) 1 B. & S. 112, 154; 30 L. J. (Q. B.) 273, 291.

(2) 4 C. B. (N. S.) 63; 27 L. J. (C. P.) 137.

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finds. The element of inequality, therefore, which is the determining fact in these cases, being here wanting, the company are at liberty to exercise the power given thus by their act of fixing the rates of charge at their discretion; and the Court will (as said by Cockburn, C.J., in *Re Baxendale v. Great Western Railway Company* (1)) "give the company credit for acting on an enlightened view of their own interests as identified with those of the public." (2)

Bovill, Q.C., in reply.

Cur. adv. vult.

Jan. 31. The judgment of the Court (Pollock, C.B., Channell and Pigott, BB.), was delivered by

CHANNELL, B. This is an action by the plaintiffs, who are common carriers, against the London and South Western Railway Company, to recover back the amount of certain overcharges which, as they allege, the defendants have made, and which they have paid under protest. On the trial before my brother Martin a verdict was found for the plaintiffs, subject to a special case, which has been since stated, and which was in the course of this term argued before us. My brother Martin went to chambers before the arguments were concluded; and this is, therefore, only to be taken as the judgment of the Chief Baron, my brother Pigott, and myself; my brother Martin, however, concurs in our opinion.

It appears from the case, that the plaintiffs carried on the business of common carriers, and for that purpose used the defendants' line, which runs between London and Southampton. There are three special claims made by them for overcharges by the defendants in respect of this use, and we have to see whether in respect of any of these the plaintiffs are entitled to recover. The question turns on the company's special act, 4 & 5 Wm. 4, c. lxxxviii., ss. 149, 155, & 156, but especially on s. 158, commonly known as the *equality clause*, which provides that all "rates, tolls, and sums shall be so fixed, as that the same shall be taken from all persons alike, under the same or similar circumstances;" and it was argued on the part of the plaintiffs, that the case was in

(1) 5 C. B. (N. S.) 353; 28 L. J. (Q. B.) 83.

(2) MARTIN, B. left the Court during the course of *Wood's* argument.

effect governed by various decisions in this and other courts, on other Acts of Parliament drawn in the same, or nearly the same, words as those I have just read.

The case, having set out the important sections of the act, then states the grounds on which each head of claim is based, and I proceed to consider them in order.

As to the first head [the learned judge then read the first claim in the words set out above, and shortly reviewed the facts stated], the case is here brought within the range of the authorities cited by Mr. Bovill, and we are clearly of opinion that on this head the plaintiffs are entitled to recover.

As to the second head, Mr. Wood very properly admitted that he could not support the course pursued by the company, and therefore on this head also we hold the plaintiffs entitled to recover.

As regards the third head, it appears that the defendants collected parcels in London, and sent them by their line to Southampton, and thence, by means of a tramway and steamers, they landed them at the Newport wharf. For this they charged a through fare to Newport. They also carried goods for the plaintiffs from London to Southampton, which the plaintiffs themselves received at Southampton station, and delivered to their consignees at Southampton, and also at the Isle of Wight. It is said that the cost incurred by the defendants in carrying goods from Southampton to Newport by tramway and steamers, is less than that necessarily incurred by the plaintiffs in carrying goods to their customers in the same place; and the plaintiffs accordingly call on us to enter into the question of what is the proper deduction to be made from the defendants' charge for carriage to Newport, when they are employed only to carry to Southampton. Now, the defendants are clearly entitled to do what they profess to do, viz., to carry on the business of common carriers from London to Newport, using their line for that purpose so far as it is available, that is, from London to Southampton, and acting as common carriers off their line, beyond Southampton terminus. Several cases were pressed on us to shew, that when railway companies collect goods in London or its neighbourhood, and at the other end deliver them, free of charge, to their ordinary customers, an inequality is caused

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if carriers, having the duty of collection and delivery, are charged at the same rate. We abide by those decisions; but with respect to their application to the present case we say, that the collection and delivery was there auxiliary and subsidiary to the business of the companies, not as common carriers, but as carriers by railway. When, however, they claim to avail themselves of the tramway and steamers referred to in the case, to enable them to deliver at Newport, this is not auxiliary and subsidiary to their business as carriers on their line, but to their position as common carriers from London to Newport, availing themselves of their line so far as it serves their purpose. We must look at the case on the facts as they are stated, and we find there no suggestion of fraud or *mala fides*; the only question is, whether we can see on the facts stated any necessary inequality, and we answer that we cannot. Therefore on this point there must be judgment for the defendants.

Judgment on the first and second points for the plaintiffs; on the third point for the defendants.

Attorneys for plaintiffs: *Uptons, Johnson, & Upton.*

Attorney for defendants: *Lewis Crombie.*

Jan. 29.

CRAGG v. TAYLOR.

Charging order under 1 & 2 Vict. c. 110, s. 14—Trust in Shares in a Company limited under 25 & 26 Vict. c. 89.

The plaintiff having obtained a charging order under 1 & 2 Vict. c. 110, s. 14, on shares standing in the name of the defendant in a company, limited, the Court refused an application to rescind the order made by the defendant on the ground that the shares were held by him in trust for a third person.

THE plaintiff in this action, having recovered judgment against the defendant for 198*l.*, had obtained an order, which Martin, B., had made absolute, under 1 & 2 Vict. c. 110, s. 14, charging with that sum fifty shares standing in the name of the defendant in the Glynrhonwy Slate Company, Limited. A rule *nisi* to rescind this order had been granted on affidavits shewing that the shares charged were owned by the defendant's brother, the Rev. V. P. Taylor, and had formerly stood in his name; but that the defen-

dant, who was a director in the company, having parted with all his shares in it, his brother, in order to qualify him for acting as a director, had, in July, 1865, transferred the shares in question into his name, to be held by the defendant as trustee for him.

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McIntyre shewed cause. This order raises the question put by Martin, B., in *Fuller v. Earle* (1), where he says, in confirming the order, "If the defendant were a trustee merely, and had been so originally, a doubtful question might arise." But the decision here ought to be the same; for it is beyond the functions of the Court to inquire into anything beyond the legal rights of the parties, and this (*viz.*, *legal* right) is the interpretation to be given to the word *right* in the statute, "standing . . . in his name *in his own right*." The case already cited, and that of *Baker v. Tynte* (2), shew that the Court will not take upon itself to decide whether the defendant has such an interest as he could charge in equity, if he appear to be the legal owner; but if he has not such an interest, no one will be injured by the order, for the order has only such an effect as the debtor's own charge would have had, and entitles the creditor to the same remedies; these remedies, whatever they may be, the plaintiff is entitled to obtain. But the present case is especially strong from the fact that by the Companies Act, 1862, (25 & 26 Vict. c. 89), under which these shares exist, it is provided (s. 30) that no notice of any trust shall be entered on the register of members required to be kept by the company (s. 25), and that the register shall be *primâ facie* evidence of all matters directed by the act to be inserted in it (s. 37). It appears, therefore, to have been the intention of the legislature not to allow any trust to exist in shares of this nature valid against third persons.

[PIGOTT, B., referred to section 43, providing for the entry of mortgages on the register.]

Cole, in support of the rule. It could not have been the intention of the legislature to charge stocks standing in the names of trustees. It is a matter of every day's occurrence that the funds of a marriage settlement are invested in stocks, and even in shares

(1) 7 Exch. 796; 21 L. J. (Ex.) 314.
(2) 2 E. & E. 897; 29 L. J. (Q. B.) 233.

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of companies under the act. If the opposite intention is admitted, all such funds may be charged, and the *cestui que trusts* will be driven to the expensive remedy of proceedings in Chancery. In *Baker v. Tynte* (1) the judgment debtor was *cestui que trust* of the fund, and the order was made under different words in the section, and in *Fuller v. Earle* (2) it was evidently a doubtful question, but here the trust is clear and uncontradicted.

POLLOCK, C.B. This rule must be discharged, and the order must stand. My brother Martin has referred me to a case of *Rogers v. Holloway* (3), in which the Court of Common Pleas, in a case very like to, though not precisely the same as this, refused a similar application. Tindal, C.J., there said (p. 299), "If we entered into the matter, it appears to me we should have to settle a complicated question of equity; and that we cannot do." On this principle I think we ought to refuse the application here.

Another strong reason for holding this is, that the act under which the shares exist requires the registration of all shareholders, and provides that mortgages shall be entered on the register (s. 43), but expressly says that no notice shall be taken of trusts (s. 30). From this we may infer that the intention of the legislature was, that third parties, at least, should not be called upon or entitled to go into the question of whether the shares are held by the apparent owner in trust for some one else. Whether, although in an ordinary partnership one man cannot be a partner in trust for another, yet a court of equity would hold that in this novel kind of partnership created by statute such a thing may be done, I do not say, but whatever the equitable rights of the parties may be, we cannot in this court take them into consideration.

MARTIN, B. I am of the same opinion. I am now satisfied that my original view was wrong, and that this order, which was made after great consideration, was rightly made. The object of the legislature plainly was that all the shareholders should appear upon the register; that is, that the register should express who are the partners in the concern; every part of the act is strong to shew this, but especially the sections referred to by my lord, and

(1) 2 E. & E. 897; 29 L. J. (Q. B.) 233.

(2) 7 Exch. 796; 21 L. J. (Ex.) 314.

(3) 5 Man. & G. 292.

my brother Pigott. The 30th section directs that no trust shall be entered on the register; that is, in substance, that no notice shall be taken of any trust by the managing body. The real owner here being unwilling to exercise his right of choice in managing the affairs of the company, has transferred his shares into the name of the defendant, to enable the defendant to exercise those functions in his behalf; but he himself claims to retain the beneficial interest. If a court of equity would, in fact, permit one person thus to screen himself from liability (should the affairs of the company be adverse), behind a nominal owner, who may from poverty or any other reason, be unable to meet the demands made upon him as a shareholder, and then to step in (should its affairs be prosperous) and take the profits, no injury is done to his rights by this order, for the order must be enforced in equity. The courts at Westminster are, by the statute, to make the order on shares in any public company standing in the name of the defendant in his own right; the meaning of this I take to be, not held by him as executor, which would satisfy all the words of the statute. The statute then goes on to say that, "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Therefore, all that the order does is, to give the plaintiff the liberty of investigating the facts; and he is entitled to have the benefit of being placed in a position to raise this question, which otherwise he could not raise at all. If he would have had any rights under such a charge made by the debtor, the order puts him in possession of these rights; if he would not, the order does not confer them upon him. I think we ought to follow the case in the Common Pleas referred to.

CHANNELL, B. I am of the same opinion. On some points which were argued before us I give no opinion; but the ground on which I proceed is this. These shares are standing in the name of the defendant in a public company; there is, therefore, *prima facie* a clear power in a judge of a common law court to make a charging order upon them. This power is sought to be impeached; and on looking at the real state of facts, we see that the defendant was made transferee of the shares only for the purpose of protecting his brother's interest in them. Whether a court of

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equity would, or would not, consider the defendant a trustee for his brother, and hold that he had committed a breach of trust in allowing judgment to go against him so as to charge these shares, it is clear that a court of law cannot interfere in the matter. It must be recollected that by the statute no proceeding can be taken to have the benefit of the order until the expiration of six months from its date; there will, therefore, be abundant time for any person who claims an equitable interest in these shares to establish his rights. Our decision agrees with the principle adopted in the case mentioned by my lord, and I think that principle is right.

PIGOTT, B. I agree with the rest of the Court. I give no opinion on the question whether the relation of trustee and *cestui que trust* may be created in these shares; that is a question more fit for a court of equity. The principle stated by Tindal, C.J., in *Rogers v. Holloway* (1) applies to this case, and the authority of that case fortifies our decision. It is obvious that the facts shew a case of some doubt, and it would be a manifest injury to the plaintiff if he were precluded from raising the question before the proper tribunal.

Rule discharged.

Attorney for Plaintiff: *George Smith.*

Attorneys for Defendant: *Phelps & Bennett.*

Jan. 20.

DYER v. BEST.

Penal Action—Common Informer—Limitation—31 Eliz. c. 5, s. 5.

The 31 Eliz. c. 5, s. 5, applies to every class of actions on statutes imposing penalties, and a person suing for a penalty for himself alone, must therefore bring his action within a year after the offence is committed, in the same manner as though he sued as an informer *qui tam*.

Lookup v. Frederick (2), followed. *Chance v. Adams* (3), questioned.

DECLARATION that before and at the time of the committing by the defendant of the offences hereinafter mentioned, the defendant was one of the commissioners appointed by virtue of the Burton-

(1) 5 Man. & G. 292.

(2) 4 Burr. 2018.

(3) 1 Ld. Raym. 77.

upon-Trent Act, 1853, (16 & 17 Vict. c. cxviii.) for putting into execution that act, and acted as such commissioner: that after the defendant became and acted as such commissioner he became and was disqualified to act by reason of then being personally concerned and participating in a certain contract made between the aforesaid commissioners of the one part, and the defendant and another of the other part, for work to be done under the authority of the aforesaid act, and by the defendant participating in the profits of the said contract, and of the work done thereunder and under the authority of the said act; yet the defendant after the passing of the said act, and after he had in manner aforesaid become disqualified from acting as such commissioner, did [on fourteen specified occasions, ranging from the 5th of February, 1862, to the 24th of June, 1865] act as such commissioner as aforesaid contrary to the form of the said statute, whereby the defendant forfeited and became liable to pay to the plaintiff who sues the defendant for the same in this action, under the said statute, the sum of 50*l.* for each and every time he so acted.

Pleas, 1. Not guilty by statute 21 Jac. 1, c. 4, s. 4. 2. That the alleged causes of action did not accrue within one year before this suit. Issues thereon.

The cause was tried before Channell, B., at the Staffordshire Summer Assizes, 1865, when the jury found that four penalties in all had been incurred, and of these that one only had been incurred within a year of the commencement of the action. A verdict was accordingly entered for the plaintiff who was a common informer suing for himself alone, for 200*l.*, with leave to move to reduce the damages and enter a verdict for 50*l.* only, on the ground that the 31 Eliz., c. 5, s. 5, applied to common informers suing for themselves alone, as well as to informers *qui tam*.

The 31 Eliz., c. 5, s. 5, enacts that all actions which shall be brought for any forfeiture on any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs, or successors only, shall be brought within two years next after the offence committed, and that all actions which shall be brought for any forfeiture upon any penal statute, the benefit whereof is by the said statute limited to the queen, her heirs, &c., and to any other who shall prosecute in that behalf, shall be

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brought by any person that may lawfully pursue for the same within one year next the offence committed, and if any such action shall be brought after the time in that behalf limited, then the same shall be void.

The 10 & 11 Vict., c. 16, which is incorporated with the 16 & 17 Vict., c. cxviii, enacts (section 9) that "any person who at any time after his appointment or election as a commissioner shall accept or continue to hold any office or place of profit under the special act, or be concerned or participate in any manner in the profit thereof, or of any work to be done under the authority of such act, shall thenceforth cease to be a commissioner." And section 15 of the same act imposes on every person acting as a commissioner, being incapacitated or not duly qualified to act or after having become disqualified, a penalty of 50*l.*, recoverable by any person in any of the superior courts.

By 21 Jac. 1, c. 4, s. 4, the defendant in any action on a penal statute may plead the general issue, and give in evidence thereunder such matter as would be a good defence if specially pleaded.

In Michaelmas Term last *Gray, Q.C.*, obtained a rule in pursuance of the leave reserved.

Huddleston, Q.C., and *Henry Matthews* shewed cause. The 31 Eliz., c. 5, s. 5, applies only to the queen and to informers suing for themselves and the queen. When an informer sues for himself alone, there is no period of limitation. His is a *casus omissus*, *Culliford v. Blandford*. (1) *Chance v. Adams* (2) decided the same point in error: *Rex v. Gall*. (3)

[POLLOCK, C.B. In many cases the courts have refused to allow actions for penalties after a year has elapsed. Can you cite no more modern authority for your position?]

There are very few instances in which an informer has sued alone. Most penal statutes give the penalty to the queen and the informer. The case of *Lookup v. Frederick* (4) is an authority which the defendant will rely on, but an examination of the record proves it to be no decision on this point.

(1) Carth. 232; Comb. 195; Show. 353; Holt, 522; 4 Mod. Rep. 129.

(2) 1 Ld. Raym., 77.

(3) 3 Salk. 200.

(4) 4 Burr. 2018.

[POLLOCK, C.B., referred to 7 Hen. 8, c. 3, whereby, after reciting that many penal statutes had been made, some of which gave the penalty to the king, some to the king and an informer, and some to the informer only, it is enacted that all actions on such statutes should be brought by the king within four years of the offence committed, and by a common informer, whether suing for the king and himself or for himself alone, within two years.]

That statute is repealed by 31 Eliz. c. 5.

[CHANNELL, B. Its repeal furnishes an argument that the substituted enactment, 31 Eliz. c. 5, was intended to be *in pari materia*, and of equal extent, and that it covers all sorts of penal actions.]

Gray, Q.C., and A. S. Hill, in support of the rule. The 31 Eliz. c. 5, s. 5, applies to every class of penal actions, and to common as well as *qui tam* informers. It would be an absurdity if, whilst the crown is limited to two years, the subject should be under no limitation. The policy of the law is not to favour informers' actions, and when 7 Hen. 8, c. 3 was repealed, the legislature never could have intended, whilst putting a further restriction on the crown by the substitution of two for four years, to leave a common informer at large.

[POLLOCK, C.B. The 7 Hen. 8, c. 3, limits all these actions in point of time. Then the 18 Eliz. c. 5, which also applies to all informers, provides for certainty of the date of issuing the writ in such actions by directing a note of the day, month and year of issue to be indorsed thereon. Then comes the statute under consideration, which, following the course of previous legislation, must rather have been intended to restrain than to enlarge an informer's powers.]

That construction is favoured by 21 Jac. c. 4, which assumes (s. 3) that a year is the universal period of limitation for these actions by a subject, and even the party grieved has only two years, 3 & 4 Wm. 4, c. 42, s. 3. As to the authorities cited, the report of *Culliford v. Blandford* in the Modern Reports (1) and in Holt (2) shews that the decision was really only whether the suing out of a *latitat* was a sufficient commencement of an action. In *Chance v. Adams* (3) the point now raised was discussed, but the report of what occurred in the Court of Error is not satisfactory.

(1) 4 Mod. 129.

(2) Holt 522.

(3) 1 Ld. Raym. 77.

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[MARTIN, B. It is a significant circumstance that that case is not mentioned in *Wms'. Saunders* ii. 63, n. 6.]

It is a case of no authority, but *Lookup v. Frederick* (1) is directly in point. This very question there came before the Court of Common Pleas on a special case, and they held that the period of limitation did apply. To the same effect are the text-writers' statements in *Tidd's Practice*, 9th ed, p. 14; and *Buller's Nisi Prius*, 7th ed. p. 195. The better opinion, according to the former, is that 31 Eliz. c. 5, applies to *all* penal actions. See also Com. Dig. Tit. Information (A. 3).

POLLOCK, C.B. With regard to the question raised in this case under the statute of Elizabeth, it appears to me that no one knowing the history of our law, would suppose that any other period than one year from the act complained of, was the period during which a common informer may bring an action for a penalty. The point is supposed to turn upon the 31 Eliz. c. 5, and perhaps, strictly speaking, it does so. In order to come to a conclusion in favour of the plaintiff, we must consider that the legislature, which by the 7. Hen. 8, c. 3, had strictly limited every informer of every kind to one year, and which by the 18 Eliz. c. 5, had taken care to provide that the date of the issue of the writ, should be indorsed upon the writ itself—both statutes, be it observed, being to repress actions by informers,—made in the 31 Eliz. c. 5, the blunder of binding the queen to two years instead of four, and of limiting a *qui tam* informer, suing as well for the queen as for himself to one year, at the same time, by the repeal of 7 Hen. 8, c. 3, setting free an informer suing *pro seipso* from any limitation whatsoever. That is the conclusion we are asked to draw. But I am of opinion that the statute may be read otherwise, and that the latter part of the section was clearly intended to include every class of penal actions, whether brought by the queen, by an informer for the queen and himself, or by an informer for himself alone. The contrary conclusion would, it seems to me, be very absurd and one which we could not come to, especially when we remember in addition what for many years has been the understanding in the profession respecting these actions.

As to the authorities on the subject, those in favour of the contrary view to that which I take are very questionable. Indeed in my judgment, if we look to the authorities, especially recollecting Mr. Gray's argument as to the case of *Lookup v. Frederick* (1), referred to in *Buller's Nisi Prius*, where, on the argument of a special case, the Court of Common Pleas decided this very question, we should be bound to construe the statute in the manner I have mentioned. The actual decisions then are in favour of this construction; and further, we have the statements in *Tidd*, *Buller*, and in *Williams' Saunders*, and greater authorities cannot be cited than these, also in favour of the same view. The older reports, I should notice, seem to omit all mention of the 7 Hen. 8, c. 3, and it was not alluded to before us in the argument on the part of the plaintiff. It appears to me to reconcile the whole course of legislation on the subject, and satisfies me that we should do injustice to the defendant, and I may add to the intentions of parliament, if we did not uphold the legal custom as to the period of limitation in these actions by informers. I am therefore of opinion that the 31 Eliz. c. 5. applies to a common informer suing either on his own account only, or for the queen also. He must therefore bring his action within twelve months, and in this case accordingly one penalty only is recoverable.

MARTIN, B. I am of the same opinion. It is notorious that these actions by informers existed to an enormous extent in the time of Henry VII., and it was considered expedient to check them. There were three classes of actions, viz., proceedings directly by the crown, by the crown and another, and by a common informer suing for himself alone. Mr. Matthews in his argument, stated that he did not know of any statute prior to 31 Eliz. c. 5. giving a penalty to the common informer suing for himself alone. The 7 Hen. 8, c. 3, however, shews that such actions then existed, because it provides for them, and limits the time within which they may be brought. Then by 31 Eliz. c. 5, an act passed when monopolies had become unpopular, a further step was taken to discourage actions by informers; and I think the act comprises all the actions which the 7 Hen. 8, c. 3, comprised. Being passed with regard to the same subject-matter it would surely be monstrous to exclude

(1) 4 Burr. 2018.

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one class of these actions, and leave them to be brought with no limitation whatever. The point, moreover, was decided by the Court of Common Pleas in *Lookup v. Frederick* (1); and in *Buller's Nisi Prius*, and *Tidd's Practice*, it is stated to have been so decided, and also that a contrary opinion had been entertained in *Culliford v. Blandford* (2); but that that opinion was unreasonable. I therefore am of opinion that the period of limitation prescribed by the statute of Elizabeth applies to this action.

PIGOTT, B. I am of the same opinion. On the question of the limitation of time, I agree with the Lord Chief Baron, and that view is supported by section 3 of 21 Jac. 1, c. 4, which enacts that an informer bringing an action for a penalty must make an affidavit that the offence was committed within a year of action brought; and the legislature therefore appear to assume that the statute of Elizabeth applies to all sorts of actions. That being so, I think that the verdict ought not to stand for more than one penalty.

CHANNELL, B., concurred.

Jan. 20. POLLOCK, C.B. I wish to add a few words to our judgment delivered yesterday in the case of *Dyer v. Best*. I find there is a case in the Irish Exchequer in which the Court expressed a strong opinion that the 31 Eliz. c. 5 was applicable to all classes of penal actions. The point itself was not directly decided there, but afterwards the Court acted on the opinion then expressed upon an occasion where a common informer sued alone, and held that he must bring his action within the year. The case to which I refer is *Barrett v. Johnson*. (3) All the cases cited before us were reviewed in the argument, and the statute 7 Hen. 8, c. 3, was referred to with numerous other statutes. In England there is no similar decision, probably because the point has hitherto been considered so well settled that it has not been thought worth while to raise it.

Rule absolute. (4)

Attorney for plaintiff: *Eaden*.

Attorneys for defendant: *Braikenridge & Sons*.

(1) 4 Burr. 2018.

(2) 4 Mod. 129.

(3) 2 Jones (Ir. Ex.) 197.

(4) The 10 & 11 Vict. c. 16, s. 17, provides that one-third of the commis-

sioners shall go out of office every three years. That being so, in addition to the rule to reduce the damages, a rule *nisi* for a new trial was obtained on the ground of misdirection in this, that the

[IN THE EXCHEQUER CHAMBER]

OAKLEY *v.* MONCK.1866
Feb. 7.*Landlord and Tenant—Tenancy continued by Remainder-man—Implied Term.*

Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainder-man, paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise, is a question of fact.

If such a tenant continues to hold under the remainder-man, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, nor is according to the custom of the country.

THIS action was brought by the plaintiff, as administratrix of H. Oakley. In the first count of the declaration, the plaintiff sued the defendant for not paying or allowing to the plaintiff for fruit-trees and shrubs growing on certain premises demised by the defendant to H. Oakley, according to the terms of the demise; and in the second count, for not appointing a person to value the fruit-trees and shrubs according to the same terms. The defendant denied the demise upon the terms alleged, and the issue joined on this plea was tried before Crompton, J., at the Cambridge Spring Assizes, 1864. A verdict was found for the plaintiff, subject to a special case, which stated as follows:—

In 1826, William Stephens the younger was, under the will of Richard Stephens, tenant for life of the premises in question, with remainder (after certain remainders which failed) to the defendant as tenant for life, with remainders over. The will empowered every

learned judge had not told the jury with sufficient distinctness, that no evidence having been offered on either side as to whether the defendant had, or had not, been re-elected, they could only find a verdict for penalties incurred within the three years immediately succeeding the act of disqualification fixed on. On this point, the Court made the rule absolute for a new trial, Pollock, C.B., stating, that without entering at length into the question, he was of

opinion that the plaintiff had not proved his case clearly enough to entitle him to a verdict. There was also a motion in arrest of judgment, on the ground that the declaration contained no specific allegation that the acts complained of were done within the county of Stafford. The venue was stated as usual in the margin, but it was contended that that was not sufficient. On the argument of the rule, however, this objection was abandoned.

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tenant for life in possession of the premises to lease them for any term not exceeding twenty-one years. In the year above-mentioned, William Stephens the younger and William Stephens the elder (who had no interest in the premises, and who died in 1829) leased the premises by indenture to H. Oakley for a term of twenty-one years, from Michaelmas, 1826, at the yearly rent of 14*l.* 14*s.* By the lease it was provided "that the lessors, their heirs or assigns, or their or his incoming tenant, shall and will at the expiration or other sooner determination of the said term of twenty-one years, pay and allow the said Henry Oakley, his executors, or administrators, for all fruit-trees and shrubs then growing and being in or upon the demised premises, which shall have been planted by the said Henry Oakley, his executors or administrators, at a fair valuation to be made by two indifferent persons, one to be chosen by each party, and in case of their disagreement, by a third person to be chosen by them jointly, whose decision shall be conclusive and binding upon each of the said parties."

The plaintiff is a nurseryman, and the demised premises were intended to be, and always have been, used by the plaintiff as a nursery-ground.

Upon the expiration of the lease, at Michaelmas, 1847, H. Oakley applied to Stephens for a fresh lease on the same terms as before; but Stephens said, "There is no occasion for another lease, you can go on from year to year:" nothing further was said about terms.

The rent had, during the lease, been abated to 11*l.*, and that rent continued to be paid after its expiration, except that from Michaelmas, 1847, to Michaelmas, 1850, an additional rent of 2*l.* was paid for a piece of land which, during that time, was held with the other demised premises.

Stephens died in April, 1856, and the defendant became tenant for life in possession. Nothing passed between H. Oakley and the defendant as to the terms on which the occupation was to continue, but he paid rent to the defendant at the rate of 11*l.* a year, ending at Michaelmas.

H. Oakley died intestate in the year 1859, and the plaintiff took out letters of administration to his estate and effects. Nothing

passed between the plaintiff and defendant as to the terms of occupation, but the plaintiff paid rent to the defendant at the rate of 11*l.* a year, ending at Michaelmas.

In March, 1862, the defendant gave the plaintiff notice to quit at the ensuing Michaelmas, but as she did not require the premises till the spring of 1863, the plaintiff was allowed to remain in possession during the winter.

In February, 1863, the plaintiff called the attention of the defendant's son to the clause of the lease set out above, but until that time neither the defendant nor her son were aware of its existence.

On the 24th of February, 1863, the plaintiff gave to the defendant a notice, which recited the lease and the above-mentioned tenancies, alleging the tenancies to have been upon the same terms and conditions as were contained in the lease; stated that the effects on the premises were subject to a bill of sale; claimed compensation under the covenant for the fruit-trees and shrubs on the premises; gave notice that the plaintiff had, pursuant to the covenant, and with the concurrence of the holder of the bill of sale, appointed a person therein named as the valuer on her behalf, to make the valuation of the effects then being on the premises under the covenant; and required the defendant to appoint some person to be the valuer on her behalf, in accordance with the terms of the covenant.

The defendant not complying with this notice, the plaintiff appointed two persons, who valued the stock submitted to their notice, and the whole of which had been planted by H. Oakley, or by the plaintiff, during their respective occupations.

In August, 1863, the plaintiff was ejected by the defendant, and in October the stock on the premises was sold by auction by the defendant's direction, and the net amount realized was afterwards, at her request, paid over to the defendant by the auctioneer.

A copy of the lease was to form part of the special case, and the Court was to be at liberty to draw any inferences of fact, or to find any facts which, in their opinion, a jury ought to have drawn or found.

The question for the opinion of the Court was, whether, among the terms of the tenancy determined by the notice to quit, was

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engrafted the covenant in the lease of 1826, or a term to the same effect, obliging the defendant to take the stock on the premises at a valuation.

If the Court should be of opinion that such a term did attach to the tenancy between the plaintiff and the defendant, the verdict was to be affirmed, and the Court was to say on what principle the damages should be assessed; the amount to be settled out of court. If not, the verdict was to be entered for the defendant.

The special case was argued in the Court of Exchequer in Easter Term, 1865, and the Court gave judgment for the defendant. (1) The plaintiff appealed.

O'Malley, Q.C. (Markby with him), for the appellant. The question is, whether the plaintiff, who but for this covenant would have been entitled to remove the fruit-trees and shrubs as her stock in trade, *Wardell v. Usher* (2), is not entitled to have the benefit of the covenant also. The receipt of rent by the lessor from a tenant whose lease has expired continues the tenancy as a tenancy from year to year, on all such terms contained in the old lease as are not inconsistent with a yearly tenancy; and here, in addition to the circumstance of the payment of rent, it is stated that the original lessor in effect told the tenant that he might go on as before. H. Oakley would therefore have clearly been entitled to claim the benefit of the covenant as against Stephens. The same rule applies where a tenancy is determined by the expiration of the estate of the landlord, and the remainder-man continues to receive the old rent upon the old days. Here, also, the terms of the former tenancy are adopted, and the new landlord is to be considered as relying upon the prudence of his predecessor. The question of whether these terms are adopted or not does not depend upon the knowledge or ignorance of the landlord, but upon the fact that he chooses, by receiving the rent, to affirm the tenancy with all its incidents, so far as those incidents are, or may be, applicable to a yearly tenancy.

[BLACKBURN, J. I do not recollect any such case where the knowledge of the remainder-man is not expressed, or might not have been assumed.]

(1) 3 H. & C. 706; 34 L. J. (Ex.) 137.

(2) 3 Scott (N. R.) 508.

None of the cases on the subject proceed on that ground.

[WILLES, J. It is not even stated as a fact, that the defendant knew that the tenancy which she found in existence was one super-vening on an expired lease.]

To make knowledge the determining fact would reduce us to this absurdity, that the tenant, who knew of the existence of the term, would hold on one contract, and the landlord, who was ignorant of it, would demise on another, which would in fact be no contract at all: *Hyatt v. Griffiths* (1); *Roe v. Ward* (2); *Doe v. Watts*. (3)

[MONTAGUE SMITH, J., referred to *Doe v. Prideaux*. (4)]

Keane, Q.C. (*D. Brown* with him), for the respondent, were not called on.

WILLES, J. We are all of opinion that the judgment of the Court below must be affirmed. It is impossible to read the case, without feeling that there may be a hardship inflicted on the plaintiff, and that property which she might have removed under the ordinary rule as to trade fixtures, may have been converted into money, which the defendant retains, in consequence of her not having taken that course at the proper time. If this should really be the case, it would be matter for the equitable consideration of the defendant; but it concerns her own good sense and feeling alone, we have only to decide the legal question. That question is, whether the defendant has so conducted herself as to be bound to fulfil the covenant contained in the original lease, or a corresponding contract made by her through her receipt of rent from the plaintiff.

The covenant in the lease was to the effect, that all fruit-trees and shrubs planted by the tenant during his term and remaining on the premises at its expiration, should be taken by the landlord at a valuation. The landlord was tenant for life, under limitations in which his estate preceded that of the defendant, who is also tenant for life of the premises. The term having expired, the tenant did not take advantage of his right under the covenant, but, having applied for a new lease, and been refused, he went on

(1) 17 Q. B. 505, 509.

(2) 1 H. Bl. 97.

(3) 7 T. R. 83.

(4) 10 East. 158.

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holding as tenant at the same yearly rent, and (on what then passed between him and the landlord) upon all such terms contained in the original lease as were not inconsistent with that tenancy. And it is probable (though it is not now necessary to decide the point) that these terms included the right to have the fruit-trees taken at a valuation.

The landlord died, leaving the original tenant in possession, who had thus either the right to call on the executors of the original landlord to take to the trees at a valuation, according to the covenant (his tenancy having now come to an end by the expiration of his landlord's title) if, as I incline to think, that term was not inconsistent with his yearly tenancy; or, if he had not that right, he had then the ordinary right of a tenant holding an uncertain interest, to remove within a reasonable time such fixtures as in the trade of a nurseryman are in the nature of trade fixtures. He did not take either course, but remained in possession, paying rent to the defendant, who succeeded as tenant for life; and, except that payment, there is nothing in the case to prove that the defendant took on herself the burden of the covenant in the lease, or of a contract similar to that covenant. The new tenancy thus constituted, though popularly spoken of as a continuing tenancy, was in fact a new contract and a new demise; and, while there is nothing except the payment of rent to shew that it was part of the terms of that contract that the trees should be taken at a valuation, there is, on the other hand, the strong improbability, pointed out by my brother Bramwell in the court below, that the tenant for life coming in should have entered into such a contract. There is no such argument against inferring the incorporation of the term in the yearly tenancy held under the former tenant for life, because what passed between them on its commencement may be considered to express or imply that this provision of the lease should continue. But no such explanations occurred on the letting by the second landlord; on the contrary, it is expressly found in the case that nothing passed between the tenant and the defendant as to the terms on which the occupation was to continue, and that both the defendant and her son were ignorant of the existence of the clause of the lease in question. Therefore we have an absence of knowledge on the part of the defendant of this term in the lease,

and also an absence of knowledge on the part of the defendant's agent (for her son seems to have acted in that capacity), and an absence of any duty on him or on her to have that knowledge; and of any circumstances making it probable that he or she would know it in fact. I assume, therefore, that at the time of the letting there was no knowledge, not only of the existence of the covenant, but that the tenancy, which was in popular language continued by the consent of the defendant, was a tenancy subject to any such special contract supervening on a lease containing such a covenant. Then what was the contract that the defendant agreed to with the original tenant? That he should continue to hold, paying the same rent on the same days; this there was no need to alter. But on what terms? The answer is simple; on such terms as were mentioned between the original tenant and the defendant, and if no terms were mentioned, then subject to the usual and ordinary terms of the place where the land was situated, or, in other words, according to the custom of the country. But we are asked to superadd another special term. Why? Only because it was one of the terms of the previous tenancy. That is no answer in law, because the contract was not the same contract. Then, is there any evidence of an assumption by the parties that the previous contract had contained this term and a new letting on that assumption? The answer is obvious, and the rule simple; those terms are to be assumed as existing which are according to use and custom, but not a special term in the original lease, not known to the defendant, and which she was not bound to know. The improbability of her assenting to such a term is not a conclusive circumstance, but it is satisfactory to reflect that in holding thus we are acting in accordance with the common sense of the case.

Mr. O'Malley has stated a difficulty on which, as he deems it such, I think it due to him to say a few words. His chief argument, and indeed the sum of all that he suggested, was that unless we held the landlord bound by this special term, the tenant would hold on one contract, and the landlord on another, which is a solecism. There can be no contract unless the parties are agreed on its terms. I will first put another case, in which, if we held in accordance with his argument, at least as great a solecism would result; and I will then shew that there is really

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no difficulty at all in what he suggests. I will assume that the landlord had survived Oakley, and that the representatives of Oakley had continued to hold under him, the lease being given up to the landlord or not having come to the knowledge of the executors; that the first tenant for life had then died during the present tenancy, the next tenant for life succeeding. Here is a case where neither the tenant nor the landlord, who were about to make a new contract of tenancy, was aware of the term; and if we must set solecism against solecism, it would be a greater absurdity to hold the one bound by, and the other able to take the benefit of, a term neither usual nor known to either party, than to treat the contract as void altogether. But there is really no such difficulty, for the case would only raise a question of fact easily solved. See what the effect would be if the difficulty were real. A tenant enters into a stipulation with the landlord's agent that the landlord shall repair a certain fence; he enters and pays rent; the fence becomes out of repair, and the tenant claims to have it repaired; the agent insists that there was no such stipulation, and a jury think that there was an honest mistake on both sides. Is the one not bound, if there was such a stipulation, and the other not bound if there was not? Is all the contract to be void, or rather, since the principal object of the contract was the letting of the land, does the demise exist on the terms which were mutually agreed on, and the mistake not have the effect of preventing the estate from passing? The difficulty is less in practice than that which occurred where a lease was made by indenture, and, the instrument being afterwards put into the fire, it was held that the rent was not destroyed, the tenancy existing by tenure, independently of the contract in the lease. The case is, I think, clear, as decided by the Court of Exchequer, and the admirable judgment delivered there by my brother Bramwell is conclusive.

BLACKBURN, J. I am of the same opinion. The plaintiff, who is the representative of the original tenant, had been in the practice of paying a certain rent to the predecessor of the defendant, and the defendant, knowing the fact, accepted the same rent from him. No doubt by this acceptance the plaintiff became tenant from year to year to the defendant, but the question is, whether

by this act any other terms were agreed upon. If both parties knew that there were certain special terms included in the former tenancy, it would be reasonable evidence, but still only evidence from which a jury, or we acting as a jury, might draw the inference of an intention on both sides that the plaintiff should hold on those special terms. But when it is once established that it is a matter of evidence, it is utterly impossible to incorporate a term not known to the defendant, though, if known and applicable, it might be supposed to be incorporated. No doubt such a case might happen as that suggested by Mr. O'Malley, of the landlord saying to the tenant, "You were tenant under a sensible and prudent man of business, and you shall continue to hold under me upon the same terms;" but in the absence of such agreement, and none such appears here, such a holding cannot be assumed unless the terms were known to both parties.

Applying these principles to the present case, there had here been originally a lease. That lease contained a clause binding the landlord to pay for all fruit trees and shrubs remaining on the land at its expiration. A person who holds a nursery ground as tenant, has a right at the expiration of his tenancy, to remove fruit trees and shrubs planted by him, and which then in fact form part of his stock in trade; but this does not entitle him to cut down or remove plants which would only be destroyed by such a process, and would after it be of no use to him for the purpose of his trade; such mere waste as this is not allowed to him by the rule. I do not understand that Oakley, by the stipulation in question, deprived himself of that right, and I mention this because the supposed hardship of the case was based on the opposite construction. I take it that the stipulation was intended merely as an inducement to him to stock the ground well. However this may be, there is evidence on which a jury might find, that Oakley and Stephens did, at the expiration of the lease, agree that the date of the valuation should be postponed to the end of the new tenancy. But Stephens having died, and the defendant coming in in ignorance of any such stipulation, it is impossible to hold that she agreed to that term, nor is it probable that if she had known of it she would have so agreed. The term not being a known term, nor one according to the custom of the country, there is no

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evidence of its adoption, and if we must draw an inference from the facts stated, whether she adopted it, my conclusion would be in the negative.

KEATING J. I also think the judgment ought to be affirmed, on the simple ground that the case finds, as a fact, that the defendant was ignorant of the term.

MELLOR, MONTAGUE SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *J. & C. Cole.*

Attorneys for the defendant: *Abbott & Jenkins.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 8.

CARR v. LAMBERT AND OTHERS.

Common—Cattle, levant and couchant—Extinguishment—Change in condition of Dominant Tenement.

A right of common appurtenant for cattle *levant and couchant*, proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but now, and for more than thirty years past, turned to different purposes, is not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purpose of feeding cattle.

THIS was an action of trespass.

The first count was for breaking and entering the plaintiff's land, and pulling up and destroying the plaintiff's posts and rails thereon.

The second count was for injuring the plaintiff's reversion in the same land, by pulling up and destroying posts and rails, being upon and parcel of the land.

Plea 5. That the defendant, John Woodall, at the times when the defendants did what is complained of, and thence to the commencement of this suit, was possessed of a toftstead, the occupiers whereof for 30 years next before this suit, enjoyed as of right and without intermission, common of pasture over the land in which, &c., in the first and second counts mentioned, for all their cattle

levant and couchant upon the said toftstead, at all times of the year, as to the said toftstead appertaining; and that the alleged trespasses and grievances were done by John Woodall, and by the other defendants at his command, for the purpose of removing obstructions to his enjoyment placed there by the plaintiff.

6. Repeating the allegations in the 5th plea, substituting the period of 60 years for the period of 30 years.

The cause was tried before Blackburn, J., at the York Summer Assizes, 1864, and a verdict was then entered for the plaintiff, on (amongst others) the issues on these pleas, with 40s. damages, leave being reserved to the defendants to move to enter the verdict for them, if the Court should be of opinion, on the facts appearing in evidence at the trial as stated below, that there was evidence to support the right of common set up in these pleas.

It was proved that, at the time of the alleged trespasses, the defendant John Woodall was possessed of a toftstead, consisting of a cottage and stable, with a garden and orchard of the extent of about two acres. Evidence was given, that about 50 years before the commencement of the action, this had been planted with fruit trees, but that before that time it was swarth, and had been depastured with cattle. No direct evidence was given as to the number of cattle which it had then supported, or was capable of supporting, and no point was raised at the trial on either side as to the necessity of proof on this subject. After a great deal of evidence had been given, the learned Judge suggested that the fact seemed clear, that the owners of the toftstead had as of right turned the cattle housed on the toftstead, but not deriving their sustenance therefrom, on the *locus in quo* for more than 30 years; and that the only question was one of law, viz., whether such a right of common was legal, or in other words, if such cattle were levant and couchant. Both sides assented to this suggestion, and no other question was required to be, or was, in fact, left to the jury; and thereupon the learned Judge directed a verdict to be entered for the plaintiff, and reserved leave to move to enter a verdict for the defendants as above stated.

A rule was afterwards obtained accordingly, and made absolute

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in the court of Exchequer (1); and from this decision the plaintiff appealed.

Hayes, Serj. (Kemplay with him), for the plaintiff. There is no trace of this precise question having been raised before; levancy and couchancy has been generally referred to only as a measure of the potentiality of the land to support the cattle for which common is claimed, and it is on this view that the judgment of the court below proceeds. It is referred to in this way by Parke, B. in *Whitlock v. Hutchinson* (2), who lays down that the land must be such as that its winter eatage and its summer crops will, together with the common, be sufficient to maintain the cattle, and this ruling has been treated as an authority for the other side. But the present point is not raised there, nor are the learned judge's words inconsistent with the plaintiff's view, and on principle and analogy the privilege ought to be confined to land which is in a condition to support cattle. The case is analogous, first to the old case of distress for rent, of cattle damage feasant, by one into whose land they have escaped by reason of a defect in fences which his tenant was bound to repair; it was laid down that he can distrain them if they have been levant and couchant on the land, *Poole v. Longueville* (3), which is taken as meaning that they have passed a night on the land, and the reason of it is that they must then have fed off it. Second, it is analogous to the case of common appendant, which is exercisable only in respect of arable land; and with respect to such a right of common it is laid down that it must be prescribed for as appendant to *land*, that is arable land, and for cattle levant and couchant; *Tyrringham's Case* (4), *Bennett v. Reeve* (5), *Rumsay v. Rawson*. (6) So also a right of turbary ceases if the house to which it is annexed is burnt down. With respect to common appurtenant itself, it is also laid down that it must be claimed for cattle levant and couchant (7); and although it can be prescribed for as appurtenant to a messuage

(1) 3 H. & C. 499; 34 L. J. (Ex.)
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(2) 2 Mood. & Rob. 205.

(3) 2 Wms'. Saund. 288.

(4) 4 Rep. 36 b.

(5) Willes. 227.

(6) 1 Vent. 18.

(7) 1 Wms'. Saund. 28, d. note (4),
to *Earl of Manchester v. Vale*; *Mellor*
v. Spateman. 1b. 346, d.

cum pertinentiis, this is because it will be intended that there was a curtilage on which the cattle might be fed. *Patrick v. Lowre* (1), *Com. Dig. Tit. Common.* (B.C.) In these decisions it was evidently assumed that the cattle were both housed on, and fed off, the dominant tenement, and there is nothing in the subsequent cases of *Whitlock v. Hutchinson* (2) and *Cheesman v. Hardham* (3) in opposition to the view. Although the land is there referred to rather as the measure of common than with any other view, probably because in those cases (as usually happens) there was no doubt about the cattle being actually fed off the land, the expressions of the judges fairly imply that this was their meaning, and the same condition is more clearly expressed by Buller, J. in *Scholes v. Hargreaves*. (4) If it were otherwise it would follow that if the dominant tenement were entirely built over, or turned into a reservoir, the right of common would still remain. Supposing, however, that it were admitted that the cattle need not be actually levant and couchant, in a literal sense, upon the land, and that they need not be actually fed off the produce of the land, yet it would be necessary that the land should be in a condition in which it *could* be fed off by them, for otherwise the land does not even serve as a measure of common. That measure can only be arrived at by seeing how many cattle the land actually does support, or supports *communibus annis*, or by seeing how many the land, in its then state, would support if cattle were turned on to it. If it would support none, then there are no commonable cattle, and whether the right is or is not extinguished it is at least suspended.

Field, Q.C. (Perronet Thompson with him), for the defendants. It is stated in the facts admitted, that the land was formerly in a condition to support cattle; if, therefore, it is necessary that, in the origin of the right, cattle should have been levant and couchant in the sense contended for on the other side, that condition is satisfied, and the question is only whether the right is lost or suspended, because the land does not now in fact support them. If it is necessary that the cattle should be levant and couchant on the land, in the strict

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(1) 2 Brown, 101, see 1 Wms'. Saund. 346, c. note (2).

(2) 2 Mood. & Rob. 205. (3) 1 B. & A. 706. (4) 5 T. R. 46.

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and literal sense, that is also admitted; and to enable the plaintiff to succeed he must shew it to be necessary that they should be actually maintained off it. The defendants, on the contrary, maintain that the condition of levancy and couchancy is only to be taken as the measure of the capacity of the land to maintain the cattle, and the supposed analogies and the authorities cited on the other side on examination support this view, which agrees with the mode in which such questions are usually left to the jury. In 1 Wms'. Saund. 346 *d.* note (1), the phrase is referred to the cattle having their abode upon the land. The analogy of its use in respect to cattle damage feasant, distrained for rent, is in favour of this meaning, for it only signifies an actual presence of the cattle upon the land for one night. The actual presence of the cattle on the land, however, is not to be taken as a fulfilment of the condition of levancy and couchancy, but is itself the condition of the question arising, since otherwise they could not be distrained at all. Neither has the condition reference to the nourishment of the cattle; but is taken as a measure of duration, indicating their abode to be of some permanence, and perhaps as happening with the consent of the owner; and it thus answers to the notice which modern law requires to be given to the owner by the landlord whose tenant has made default in repairing the fences, and which has superseded the condition formerly required of levancy and couchancy. See 2 Wms'. Saund. 290, note. (7) With respect to common appendant it is said, in *Tyrringham's Case* (1), that if a man prescribes for common appendant to a house, or meadow, or pasture, it is bad, because it appears, on his own showing, that there was always a house, and meadow, and pasture; that is, there is no inference from his statement that there ever was any arable land; but, on the other hand, it is said that, if part of his land is built upon, and part turned into pasture his right of common remains, though he must still prescribe for it as appendant to *land*. All that *Bennett v. Reeve* (2) and the other cases cited decide, is, that with respect both to common appendant and common appurtenant, it is necessary to aver that the cattle were levant and couchant; but they do not state the

(1) 4 Rep. 37 *b.*

(2) Willes. 227.

phrase to mean that the cattle are actually supported off the land; and no number of cases stating the necessity of this condition will prove it to be necessary that the cattle should be actually fed off the land, unless it is first established that this is the meaning of the term, which is the very thing to be proved. It is laid down that common may be claimed in respect of a messuage (see cases cited in 1 Wms'. Saund. 346. c. note 2); but with reference to this, *Patrick v. Lowre* (1) is relied upon, as shewing that the messuage must have lands belonging to it on which the cattle are fed. This inference is, however, erroneous, for all that is said is, that it shall be intended the beasts are "nourished and fed *upon* the land;" not that they are fed *off* it; the meaning is only that they shall be housed there, as is shewn by the words "it shall be intended so many of the beasts, *which may be tied*, and are usually to be maintained and remaining within the house;" and this agrees with what Lord Kenyon says in *Scholes v. Hargreaves* (2), in denying the sufficiency of the dominant tenement, "it was expressly proved that no horse or bullock could possibly be kept there." If, therefore, levancy and couchancy refer to the locality of the cattle at all (which upon the later law may be doubted), they refer only to the housing of the cattle upon the land, not to the locality of the place from which their sustenance is derived; and on the authority of the cases cited it may be maintained that, if the land were entirely built over, or, as suggested on the other side, turned into a reservoir, the right of common would clearly remain if there were any possibility of housing the cattle there, and would probably remain even if that were impossible; and it would only be necessary to prove, as is done here, that the land was once in a condition to support so many cattle as have been turned on to the common. It was for want of the proof of this condition that *Scholes v. Hargreaves* (2) was decided against the right of common; Lord Kenyon saying, that "levancy and couchancy are a mode of admeasuring the common;" and that language is adopted by Bayley, J., in delivering the considered judgment of the Court in *Cheesman v. Hardham* (3), where he himself says more distinctly,

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(2) 5 T. R. 48.

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that "the fair meaning of the words cattle levant and couchant, is, the number of cattle which the land is *capable* of maintaining." This is stated as the result of *Rogers v. Benstead* (1), (see also *Fulcher v. Scales* (2)); and it agrees with the rule laid down by Parke, B., in *Whitelock v. Hutchinson*. (3) The land would not cease to be capable absolutely, because it was not at the present moment actually capable, *Cole v. Foxman* (4), and the measure would, if necessary, be obtained by resorting to evidence as to how many it in fact maintained formerly, or by a comparison with neighbouring land. But in the present instance, it is to be observed, that there is nothing in the actual condition of this land which makes it impossible, or even difficult, to turn it to the purpose of feeding cattle. The result is, that there is no authority for saying that, when a possible origin for the right of common is shewn, actual levancy and couchancy, in any sense, is necessary for its continuance; certainly not in the sense of the cattle being actually supported by it, which is the only sense which will assist the plaintiff. This agrees also with the reason of the thing; for the consequence of the opposite doctrine would be, that an improved system of tillage adopted by the commoner would deprive him of his rights. Common appurtenant differs from common appendant in this, that the latter is a right for certain specific purposes; if those purposes are no longer required, there might be some reason to say that the right would cease; but the former is a right of a general character, annexed to the dominant tenement, not for the greater enjoyment of that tenement in itself (as by ploughing or manuring it), but for the general profit of its owner, and as an additional grant. Again, it does not interfere with the enjoyment of the lord, or of the other commoners, that the cattle should be fed otherwise than off the produce of the dominant tenement, if the owner does not exceed his rights of common as measured by his land; and it is agreeable to the principles of law to limit acts of enjoyment, not with reference to the benefit derived by the claimant of the right, nor the mode in which he derives it, but with reference to the kind and degree of burthen imposed upon others by his acts. The kind and degree are here

(1) 1 Selw. N. P. (12th ed.) 484.

(2) *Ib.*

(3) 2 Mood. & Rob. 205.

(4) Noy. 30.

the same, whether the cattle are fed off the dominant tenement or not, and no definite principle or authority has been shewn to limit the operation of that rule.

Hayes, Serjt., in reply.

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Feb. 8. The judgment of the court (Willes, Blackburn, Mellor, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. In this case, which was argued before us yesterday, and in which we postponed our judgment, we are of opinion that the judgment of the court of Exchequer is right, and ought to be affirmed. The main part of my brother Hayes' argument was this: he insisted that the character of the dominant tenement had been so altered from its character of pasture, by means of a building being placed upon it, and the rest turned into orchard ground, that thirty years' user of common by cattle housed upon, but not fed off, it, was not evidence of any right which could in point of law exist. His argument had considerable force with reference to a total change of character, but much less force can be allowed to it with reference to the facts of the present case. If he could on the facts have established the conclusion that the character of the dominant tenement was so altered that it could not be applied to the purpose of producing fruits on which to keep cattle,—if, for instance, a town of considerable extent had been built upon the land and its neighbourhood, or if it were turned into a reservoir, as was suggested in the argument, it might be a question whether the right of common were not extinguished or suspended. We do not express any opinion on that question, because on the facts stated it seems that the toftstead, which was the dominant tenement, consisted of a cottage and a stable, with a garden and orchard of two acres. It had, therefore, land in a state in which it might have been laid down for pasture, or for meadow, or cultivated so as to produce artificial plants and roots for the support of cattle. This is, therefore, not the case of a dominant tenement, so changed in character as that cattle might not be fed off its produce. If, then, my brother Hayes had succeeded in satisfying us that the expression of levancy and couchancy is not a mere measure of the capacity of the land to keep cattle out of artificial or natural produce grown within its limits, but that it is

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further necessary to shew that it could, in its actual state, produce such food, he would still not have succeeded in shewing facts negating the capacity of the land to do this; for the evidence is quite consistent with the following state of facts—land in a state of cultivation suitable for the support of cattle, afterwards in part built upon, and the rest cultivated, not with a view to the support of cattle, but in a state in which it might easily be turned to that purpose. There is no authority, either in the class of cases relating to the abandonment or loss, or to the suspension of rights, by the destruction, absolute or temporary, of the necessary measure of enjoyment, which would justify us in holding that a right, once created and existing, was under these circumstances destroyed by the act of the proprietor. The acts of use which have been proved ought to be referred to a legal origin, if they are consistent with it, rather than treated as a series of trespasses; and their inconsistency with legal right is not to be assumed, unless they could not be attached to a legal origin, or the right to which they were attached has been since extinguished or suspended. Our judgment proceeds on this proposition, that facts appear which shew their referribility to a legal origin, and that it has not been shewn that the right was suspended or extinguished; and whoever has heard cases of this nature tried will think that the direction usually given on their trial is in accordance with our present decision. That direction refers to levancy and couchancy, rather as the measure of capacity of the land; than as a condition to be actually and literally complied with by the cattle lying down and getting up, or by their being fed off the land. The judgment of the court of Exchequer is therefore affirmed.

Judgment affirmed.

Attorneys for plaintiff: *J. W. & W. Flower.*

Attorneys for defendants: *Williamson, Hill, & Co.*

WILSON v. THE NEWPORT DOCK COMPANY.

Damages—Measure of, for breach of Contract—Remoteness.

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The defendants having contracted with the plaintiff to receive his ship into their dock at a specified time, and having given him notice that they could then receive her, she was brought to the dock in ballast upon a stormy day, under the charge of her captain and a pilot. Owing to the breaking of one of the chains of the dock-gates, the defendants were unable to let her in. The captain, after consultation with the pilot as to the best course to be pursued, anchored the ship outside the gates. At the turn of the tide she grounded on a sandbank and broke her back. The plaintiff having brought an action against the defendants for the damage done to the ship, two questions were put to the jury upon the trial: first, was it possible to have taken the ship to a place of safety; and secondly, if so, was it the captain's or the pilot's fault that she was not taken there? On the first question the jury were unable to agree, and in reply to the second, found that neither the captain nor the pilot had been guilty of negligence. The judge thereupon directed a verdict for the plaintiff, with leave to enter it for the defendant, the Court to draw inferences of fact consistent with the finding of the jury:—

Held, by POLLOCK, C.B., CHANNELL and PIGOTT, BB., 'that the finding of the jury was not sufficient to enable the Court to draw any conclusion as to whether or not the loss was occasioned under circumstances rendering the defendants liable for the damage to the ship, as the consequence of their breach of contract, within the rule laid down in *Hadley v. Baxendale* (1), and that there must be a new trial.

Held, by MARTIN, B., that, on the facts and finding of the jury, the damage done to the ship might be fairly and reasonably considered as the consequence of the defendants' breach of contract.

DECLARATION, that the defendants were proprietors of a certain dock on the river Usk, which dock was used by them for the reception of and docking of ships, for reward to the defendants in that behalf; that the plaintiff was the owner of a ship, and was desirous of having the same received and docked by the defendants in their dock for reward to the defendants, whereof they had notice, and thereupon, in consideration that the plaintiff would cause the said ship to be brought at a certain time and on a certain day towards and to the dock, for the purpose of being received and docked therein, the defendants promised him so to receive and dock the ship; that the plaintiff, relying on the defendants' promise, did cause the ship to be brought at the time and on the day aforesaid towards, and the same was

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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being brought towards and to the dock, for the purpose of being so received and docked therein as aforesaid, and all things were done, &c., yet the defendants did not, nor would, receive and dock the ship of the plaintiff, and the ship being, by reason thereof, left in the river at the ebbing of the tide there grounded, and was thereby damaged and injured, and the plaintiff incurred great expenses in and about having such damage and injury repaired.

Plea. Payment of 15*l.* into court.

Replication damages ultra. Issue thereon.

The cause was tried before Byles, J., at the Monmouthshire summer assizes, 1865, when the following facts were proved:— On the 17th of November, 1863, the plaintiff's ship, *Lord Elgin*, was in dry dock at Newport, where she had been undergoing repairs. The plaintiff was desirous of removing her, the repairs being complete, to a wet dock, and accordingly applied to the defendants, who are dock proprietors, to know if they could receive her, and on the evening of the 17th they sent a notice to the captain that, on the following morning by the first tide, the ship might come down from the dry dock to the wet dock where they would receive her. Accordingly next morning the ship was towed down the river Usk, in charge of her captain and a river pilot, to a point opposite the defendants' dock-gates, but on her arrival the defendants stated that they could not admit her owing to a chain of one of the dock-gates being out of order. A discussion thereupon ensued between the captain, who was wholly unacquainted with the river, and the river pilot as to what course should be adopted. The *Lord Elgin* was in ballast, but the morning was stormy, and she was not in a condition, in the captain's opinion, to go further down the river into deep water. The pilot, however, thought he could prudently have taken her either to a place called West Point or into deep water. Some evidence was also given as to the possibility of her being taken back safely up the river to a place called Wilmot's Wharf, but her voyage thither would have been hazardous, owing to the number of small craft that happened to be in the river. Eventually, however, anchor was cast, and the ship remained where she was, outside the defendants' dock. When the tide turned she floated round, and in a few hours

grounded on a sandbank and was there "hogged," *i.e.*, broke her back. She sustained great damage, and the plaintiff now sought to recover the expenses he had been obliged to incur in repairing her. It was conceded that the amount paid into court was enough to cover the expense of bringing the ship to the dock-gates, but it was wholly inadequate to cover the expense of repairing the injuries done to the ship by grounding.

The learned judge left the following questions to the jury:—
1st, Was there a place of safety to which, under existing circumstances, the vessel might have been taken? If so, was Wilmot's Wharf, or West Point, or below (the deep water), a place of safety? 2nd, Whose fault was it that the vessel was not taken there? Was it the captain's or the pilot's fault? The jury were unable to agree in an answer to the first question. In answer to the second they found that neither the captain nor the pilot was guilty of negligence. On that finding the learned judge directed a verdict for the plaintiff, the damages to be assessed out of court, leave being reserved to move to enter a verdict for the defendants, the Court to have liberty to draw inferences of fact not inconsistent with the finding of the jury.

In Michaelmas Term, 1865, a rule *nisi*, pursuant to leave reserved, to enter a verdict for the defendants, was obtained on the ground that the money paid into court was sufficient to cover the damages legally recoverable in the action, the amount claimed for the injury by the "hogging" of the ship being too remote; and for a new trial, on the ground of misdirection by the judge in entering the verdict for the plaintiff on the finding of the jury, and that there was a miscarriage in the finding of the jury, and that the verdict was against the weight of evidence.

Jan. 19, 20. *Mellish, Q.C., Cooke, Q.C., and Dowdeswell*, shewed cause. The plaintiff is entitled to recover for the damage done to the ship by her grounding, as well as the expense of bringing her down to the defendants' dock. The injury was the direct consequence of the defendants' breach of their contract, and occurred to the subject-matter of that contract. The case, therefore, differs from *Hadley v. Baxendale* (1), where a

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

1866 <hr/> WILSON v. THE NEWPORT DOCK CO.	correct rule, it is admitted, was laid down, but one which should not be extended: see per Crompton, J., in <i>Smeed v. Foord</i> (1); <i>Randall v. Raper</i> (2), <i>Collen v. Wright</i> (3), <i>Gibbs v. Trustees of the Liverpool Docks</i> (4), <i>Bridge v. Grand Junction Railway Company</i> . (5)
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[POLLOCK, C.B. The defendants will probably contend that the ship ought to have been in a condition to encounter the possible peril arising from unavoidable delay.]

The plaintiff prepared his ship properly for the passage to the dock. Although it was his duty, not wantonly to increase the risk, he was surely not bound to have prepared his ship with ballast, &c., to meet the contingency of a breach by the defendants of their contract. As to the misdirection imputed, the verdict was rightly entered on the finding of the jury, that there was no fault in either the captain or the pilot. Having found that fact, there was no need to answer the first question put to them.

[They also contended that the verdict was supported by the evidence.]

Huddleston, Q.C., Gray, Q.C., and Henry James in support of the rule. The damage to the ship was neither the natural consequence of the defendants' breach of contract, nor within the contemplation of the parties. It is therefore not recoverable: *Hadley v. Baxendale* (6), *Fletcher v. Tayleur* (7); per Lord Campbell, C.J., in *Smeed v. Foord* (8); 2 Kent's Commentaries, 10th ed., p. 711; *Sedgwick on Damages*, 2nd ed., c. 3, pp. 57-67. The expense of bringing the ship down was the only natural consequence. That the ship herself was injured may have depended on a number of other circumstances besides the defendants' breach of contract, *e.g.*, the stormy weather, or the fact of the ship not being ballasted to go, if necessary, into deep water. Suppose she had been run down, whilst at anchor, by another vessel, could it

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| (1) 1 E. & E. 602; 28 L. J. (Q. B.)
178.
(2) E. B. & E. 84; 27 L. J. (Q. B.)
266.
(3) 7 E. & B. 301; 26 L. J. (Q. B.)
147. s. c. in error 8 E. & B. 647; 27
L. J. (Q. B.) 215. | (4) 1 H. & N. 439; 28 L. J. (Ex.) 57.
(5) 3 M. & W. 244.
(6) 9 Ex. 341; 23 L. J. (Ex.) 179
(7) 17 C. B. 21; 25 L. J. (C. P.) 65.
(8) 1 E. & E. at p. 613; 28 L. J.
(Q. B.) at p. 182. |
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have been argued that the defendants would have been liable? Yet the accident which happened was as unconnected with their fault as the result of a collision would have been.

[*Mellish, Q.C.*, referred to *Davis v. Garrett* (1), in which the plaintiff put on board the defendant's barge lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course. During the deviation a tempest wetted the lime, and the barge taking fire, the whole cargo was lost, and the defendant was held liable.]

That case is distinguishable because the defendant's was a continuing breach. Again, taking the other branch of the rule in *Hadley v. Baxendale* (2), as a test the damage cannot have been within the contemplation of both the parties. The plaintiff certainly did not foresee it, or he would have put more ballast in his ship; and the defendants could not have foreseen either that the river would be so full of small craft, as to prevent the plaintiff's ship from returning to Wilmot's Wharf, or that it would blow so strong as to make it dangerous for her to go into deep water. Lastly, the verdict was wrongly entered. The most important question was left unanswered. It may be that the ship could have been taken to a place of safety, and if so the defendants are clearly not liable, although the jury have found that neither the captain nor the pilot were to blame in anchoring where they did. The finding, as it stands, is not clear enough to throw the responsibility of the accident on the defendants.

[They also contended that the verdict was against the weight of the evidence.]

Cur. adv. vult.

Feb. 8. The learned judges differing in opinion, the following judgments were delivered:—

MARTIN, B. [after referring to the pleadings, proceeded as follows]:—The facts proved are very simple and clear. On the 17th Nov., 1863, the ship *Lord Elgin* was in a dry dock at Newport, and upon the morning of the following day, by the direction of the dock-master of the defendants' dock, proceeded towards it for the purpose of entering it. She was in ballast. It was a very

(1) 6 Bing. 716.

(2) 9 Ex. 341; 23 L. J. (Ex.) 179.

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short distance from the dry dock to the defendants' dock, and she was towed by a steam-tug stern foremost, and arrived near the defendants' dock-gate about high water, when, in consequence of a chain of the dock-gate being broken or out of order, she could not be admitted. The captain of the *Lord Elgin* was unacquainted with the river and its navigation, and he directed the ship to be anchored where she was. In about three hours afterwards, upon the ebb, she took the ground, and sustained damage, and the present question is in respect of this damage. The 15*l.* was paid into court to cover the expense of bringing the ship down to the dock. There does not seem to have been any application made to the learned judge at the conclusion of the plaintiff's case to nonsuit or direct a verdict for the defendants upon the ground that there was no evidence to go to the jury; and witnesses were called for the defence. On the argument before us it was contended that, upon the evidence, the captain of the *Lord Elgin* acted improperly; that he ought not to have anchored where he did; that he ought to have done one of several things; that he ought to have gone back towards the dry dock, or have gone down to a place called West Point, where it was said the ship could have safely grounded, or gone into deep water and there anchored.

The master stated reasons why, in his opinion, none of these things ought to have been done. It was also alleged that the ship was not sufficiently ballasted. According to the judge's note, it was contended on behalf of the defendants that the damage was too remote, and was unconnected with the cause of action, and upon this point he gave leave to move. He then proposed two questions to the jury—First, whether there was, in fact, any place of safety to which the vessel might have been taken; upon this question the jury could not agree: Secondly, whether both the captain and the pilot did the best they could, under the circumstances, and were either of them guilty of any negligence; to this the jury answered that they both did the best they could, and that neither of them were guilty of negligence. Upon this finding the learned judge directed the verdict to be entered for the plaintiff (the amount of damages having been agreed to be referred), and he gave the defendants leave to move, with power to the Court to draw any inferences upon the facts consistent with the finding of

the jury. The learned judge adds that the facts were entirely for the jury, and that he does not disapprove of their finding. I concur with him, and I think his direction that the verdict should be entered for the plaintiff was right in point of law.

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The question of damages is of constant occurrence; it occurs in almost every action of contract except contracts for the payment of a certain fixed sum of money, and necessarily in every action for a wrong. Ordinary cases on contracts are actions for the non-delivery or non-acceptance of goods agreed to be sold, on agreements for the sale of land, for breaches of promise to marry, for the acceptance or non-delivery of stock or shares, and an infinite variety of others might be named. So, also, in actions for wrongs, it occurs every day; for instance, in actions for injuries sustained by accidents on railways and by collisions, which now constitute a considerable number of the causes tried at *Nisi Prius*; in actions for libel and slander, for assault or false imprisonment, and in numberless other cases. In some instances the measure of damages is fixed and ascertained by long established usage; for instance, for the non-delivery of goods which are the subject of common sale in the market, I apprehend a judge is bound to tell the jury that the measure of damages is the difference between the contract price and the market price, and that if he does not, his summing up would be liable to objection: and there are other cases in which like long usage has fixed the measure of damages. So, also, in some cases the matter of damages has been the subject of decision in the superior courts, and I apprehend that when this has been so, the decision is a binding authority upon the same and other courts in like manner and to the same extent as other decisions. For instance, the case of *Hadley v. Baxendale* (1), which was frequently referred to in the argument, is a decision of this kind. The plaintiffs, who were millers, had delivered to the defendants, common carriers of goods at Gloucester, a broken iron shaft, to be carried by them to Greenwich and delivered to an engineer there, in order to enable him to use it as a model for making a new shaft. They were told that the mill was stopped in consequence of the shaft being broken, and they promised that if the shaft was sent before a certain hour it would be delivered at

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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Greenwich the following morning. The delivery of the shaft was delayed by some neglect, and the plaintiffs did not receive the new shaft for several days after the time they otherwise would have done, and they claimed damages for the loss of profit which they would have made had the new shaft been delivered earlier. The late Mr. Justice Crompton left the case generally to the jury, who found a verdict for the plaintiffs. A rule was granted by the Court of Exchequer for a new trial for misdirection, because that they were of opinion that the judge ought to have told the jury to exclude the loss of profits in estimating the damages. This case is, therefore, an authority that in a similar case such loss of profit cannot be made an element of damages, and must be excluded; but it is an authority no farther, and anything said by the Court in delivering judgment is to be judged by its being consonant to law and reason. The decision in *Hadley v. Baxendale* (1) is, therefore, no authority whatever in the present case, for no loss of profits is claimed, nor is it an authority that loss of profits is not a legitimate element of damages in many other cases; for instance, in a railway accident whereby a tradesman or workman is prevented from attending to his business by the injury sustained. The loss of profits in such cases is a constant element of damages, and in a case tried the other day at Liverpool, where so large a sum as 7000*l.* was given in a case under Lord Campbell's Act, the sole element of damages was the loss of profits of the deceased in his profession of a surgeon, and no objection was made on this ground, and I have no doubt whatever, that if the judge had told the jury to exclude it, there would have been ground of misdirection.

In regard to the present case, there is no established rule and no decision, and the general rule is to be applied. This rule is, that the damage to be compensated for ought to be proximate to, and not remote from, the breach of contract or the wrong, and ought fairly, and reasonably, and naturally to arise from them. I do not adopt the qualifications mentioned by Mr. Baron Alderson in the judgment in *Hadley v. Baxendale* (1) as applicable to every case. They may have been perfectly right there, but they are not of universal application. "‘Naturally,’" he says, "means, according to the usual course of things;" but contracts are infinite in

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

variety, and suppose, as in this case, no such claim for damage has ever been known to have been made, no usual course of things exists; but the damages to be recovered by the plaintiff are not, in my opinion, therefore to be nominal. And he proceeds to say, “such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.” Now this may properly enough be taken into consideration in the case of carriers and their customers, but in the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed, and not broken, and in the infinite majority of instances the damages to arise from the breach never enter into their contemplation at all. As to *Hadley v. Baxendale* (1), I was a party to it, and have no desire to depreciate it, but in *Boyd v. Fitt* (2), the Court of Exchequer in Ireland dissented from it, and approved of the views of the late Mr. Justice Crompton [*Smeed v. Foord* (3)] and Sir James Wilde [*Gee v. Lancashire & Yorkshire Railway Company* (4)], as being the sounder expositions of the law as to remoteness of damages. The general rule is, therefore, to be applied to the present case, and ought, as all other general rules, to be fairly, candidly, and impartially applied. It has been said that the damage sustained here has been very great. Now, I am clearly of opinion that this ought to be no element whatever in the application of the rule, and whether the damage be 10% or 10,000% is immaterial.

The circumstances are these:—In pursuance of the defendants’ contract to admit the ship into the dock at a certain time upon a certain day, the ship was brought to the entrance of the dock. The defendants could not admit her, in consequence of a defect in a chain of the dock-gate, and their contract is admitted to have been broken. No blame attaches to them; it was their misfortune that the chain had been broken. The ship was then left in the river, which is one emptying itself into the Bristol Channel, where the tide flows and ebbs to a very great height. The captain had to decide what was to be done under the circumstances in which he was placed. Four courses have been suggested as open to him:

- (1) 9 Ex. 341; 23 L. J. (Ex.) 179. (3) 1 E. & E. 616; 28 L. J. (Q.B.) 183.
 (2) 14 Ir. Com. Law Rep. 43. (4) 6 H. & N. 221; 30 L. J. (Ex.) 11.

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one, that he should remain and anchor where he was; secondly, that he should have gone up the river towards the place from whence he came; thirdly, that he should have gone down to West Point, where it was said the ship would, upon the ebb, have settled upon soft mud; and, fourthly, that he should have gone into deep water, where the ship would have always been afloat. Now, I think the defendants had a right to a *bonâ fide* and reasonably sound judgment exercised upon this matter. The captain decided upon remaining where he was. The tide was ebbing and the weather was threatening. If either of the three other courses had been adopted, it might have been that the ship would have sustained no damage, but it might have been that she would have been totally lost. But I think this was a question for the jury, and that they have decided it. They have found that the captain did the best he could under the circumstances, and was not guilty of any negligence. The consequence was that, when the tide ebbed, the ship took the ground, and sustained damage, and the question which has been argued before us is, that this damage is too remote and so unconnected with the cause of action that it must, as matter of law, be borne by the plaintiff, and that the defendants cannot be responsible for it. I do not concur in this view. There has been damage—it must be borne by some one. Neither the plaintiff nor his captain are in the slightest default. If the defendants had performed their contract no damage would have occurred. In consequence of their default the captain was compelled to exercise his judgment and discretion, and the jury have found he did the best he could, and was guilty of no negligence, by which I understand that in deciding to remain where he was he exercised such judgment and discretion as became a reasonable and prudent man. His doing so was no doubt the immediate cause of the damage, but in my opinion his remaining there was in contemplation of law the same as if the ship had been compelled to remain there by a *vis major*.

The rule is that the damage must be proximate (not immediate), and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ; but many instances could be mentioned in which damages much more remote than the present were held to be the subject

of compensation, as in *Powell v. Salisbury* (1), and *Byrne v. Wilson*. (2) 1866

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There is a case of constant occurrence at Guildhall. A barge is injured by a collision in the Thames; she is taken to the nearest convenient and fitting place on the shore. Upon the ebbing of the tide she comes down upon a pile, and sustains further damage. My own belief is that compensation for such damage has been recovered over and over again without objection, and upon referring to some gentlemen at the bar, whose experience upon the subject is the greatest in the profession, I have been assured that it has continually been so. Such damage is precisely analogous to the present. Some possible cases were mentioned in the argument, and it was asked whether the defendants would have been responsible. One was, if the ship had been run down by another ship when at anchor. I think the liability in such cases would depend upon the circumstances, and a material one would be whether the running down ship was in the wrong. Another case put was, if the ship had been upset where she was anchored in a hurricane. This, I think, would raise a question for the jury, whether, in all human probability, the same misfortune would not have happened to the ship, wherever in the river she happened to have been. In my opinion the discussion of instances like these are of very little bearing or weight, if the facts of the case to be adjudicated upon are clearly and well defined. The question of damages in each case must be determined upon its own circumstances.

But I think the point is decided by the authority of *Jones v. Boyce*. (3) The plaintiff there was a passenger by a stage coach, a rein broke, the coachman drove the coach towards the side of the road, and one of the wheels was stopped by a post. The plaintiff jumped off, and his leg was broken, and he brought the action against the coach proprietor for damages. Lord Ellenborough said there were two questions for the jury: first, as to the defendant's default in regard to the rein, which is immaterial to the present case. The second was whether the defendant's default was conducive to the injury which the plaintiff had sustained, for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the

(1) 2 Y. & J. 391. (2) 15 Ir. Com. Law Rep. 332. (3) 1 Stark. 493.

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plaintiff as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action was not maintainable. Amongst observations upon the peculiar circumstances of that case, he said that it was for the consideration of the jury whether the plaintiff's acts were such as a reasonable and prudent mind would have adopted; and he added, "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences." I think the present case is analogous. The defendants did not perform their contract to admit the vessel into the dock. They thereby imposed upon the captain four perilous alternatives. He adopted one. The jury found that he did the best he could, and was guilty of no negligence, and damage ensued to the ship. In my opinion the defendants' default directly conduced to this damage, and they are responsible for it, upon the principle enunciated by Lord Ellenborough in *Jones v. Boyce* (1), which is equally good law and good sense. For these reasons I think the damage is not too remote, that the learned judge submitted the right question to the jury, and I concur with him that the verdict is unobjectionable, and I think, therefore, that the rule should be discharged.

POLLOCK, C.B. This case comes before us on a point reserved at the trial, viz., "Whether the damages were too remote;" and to assist our judgment we have, first, the notes of the learned judge taken at the trial; secondly, the answer of the jury "that the pilot and the captain did the best they could under the circumstances, and were neither of them guilty of any negligence," and we have the fact that the jury (who were locked up till a late hour) could not agree on the question "whether there was in fact any place of safety to which the ship might have been taken," and the questions for our decision seem to be, first, ought the verdict to stand, not a verdict found by the jury, but entered for the plaintiff by the learned judge on the jury answering one question and being unable to agree upon another question, which we think the more important and decisive of the two; or, secondly, ought we to enter the verdict for the defendants? or, thirdly, ought we to direct a new trial?

In deciding these questions it is necessary to ascertain the facts of the case as found by the jury, for with evidence so contradictory

and repugnant we cannot find any verdict ourselves. It is not our province. If the facts can be ascertained, then what is the law applicable to them? We apprehend when the facts of the case are known it is the province of the Court to say for what matters damages are to be given, but the amount of damages is a question for the jury quite as much as the credit due to the witnesses. When the result of the evidence is uncertain it is for the jury to find the facts, and they will therefore often have to find whether the facts fall within the rule of law to be laid down on the subject.

The case of *Hadley v. Baxendale* (1) was cited at the trial and much commented on during the argument. That case was very much considered. The argument took place several weeks before the judgment was given, and I know that great pains were bestowed upon it. Lord Wensleydale, the late Baron Alderson, and my brother Martin were parties to it, and it is due to Lord Wensleydale and the late Baron Alderson to say that a more extensive and accurate knowledge of decisions in our law books, and a more acute power of analyzing and discussing them, and as far as my brother Martin is concerned, in addition, a larger acquaintance with the exigencies of commerce and the business of life, never combined to assist at the formation of any decision. And certainly it does not lessen the authority of that case that Lord Campbell in *Smeed v. Foord* (2) said that it merely affirmed what was to be found in 2 Chancellor Kent's Commentaries 665, in Pothier, and in all the other authorities in the French code; and it may be added that Mr. Justice Crompton, against whose summing up it was directed, in that same case said he agreed with it as far as it went, which we consider to be agreeing with it altogether. That decision was not presented as any new discovery in jurisprudence, but we think it put in a clearer and more distinct light a principle which had been previously recognised in prior cases, and the want of which in the English law had been pointed out. The authorities are all collected in a note to *Vicars v. Willcocks* in the second volume of Smith's Leading Cases, fourth edition, by Mr. Justice Willes and Mr. Justice Keating. It is quite true, as remarked by Sir James Wilde, in *Gee v. Lancashire*

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(1) 9 Ex. 341; 23 L. J. (Ex.) 179. (2) 1 E. & E. 602; 28 L. J. (Q.B.) 178.

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and *Yorkshire Railway Company* (1), that the case is not applicable to, and does not decide, every case. No rule, no formula could do that. Cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees. No two are exactly alike, and one description cannot be applicable to all. No precise positive rule can embrace all cases, and notwithstanding any rule of law that may be laid down it must be admitted after all that the question of the amount of damages is one for the jury and the jury only, and provided the law on the subject be properly laid down by the presiding judge and then the amount of damages be left at large for the jury, we apprehend a Court would not interfere with their verdict because the jury had apparently come to some compromise among themselves and had not strictly observed the supposed rule of law. We think that the decision of twelve jurymen instructed from the bench in the rules of law, but exercising their own judgment on a subject connected with the business of life with which they are familiar, would practically lead to a result often more just and equitable than any mere rule of law could arrive at; and that there may be no mistake as to our meaning we may add, that should this case go to a second trial, some of the jury might think the plaintiff entitled to recover the whole damage, others might think it the height of imprudence on the part of the master to attempt to remove a vessel from a dry dock to a wet dock about the time when the wind was blowing a hurricane, which from his evidence seems to have been the case, and from which charge of imprudence the verdict of the jury has not relieved him. The result might be a compromise which we are confident the Court would not, and which we think they ought not, to disturb.

We think we are not able to determine from the materials before us whether or no the loss was occasioned by circumstances which, according to the case of *Hadley v. Baxendale* (2) and the other authorities, would make the dock company liable for the damage the ship sustained. If the state of the weather was the efficient cause of the loss, we think the defendants are not liable. Now as to the state of the wind, the evidence of the mate is, "Not much wind, blowing pretty stiff, a fresh breeze." The

(1) 6 H. & N. 221; 30 L. J. (Ex.) 11. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.

evidence of the captain was, "It was only a few hours before a perfect hurricane." James Dunster, the master-rigger, says, "It was blowing so hard it would not have been safe to take her into deep water." If the weather was such that on being excluded from the dock she had no alternative but to perish on account of the gale or hurricane, which seems to me to have been the opinion of the master, then it may be doubted whether she ought to have been taken to the dock-gates at all in such a state of the weather, and the opinion of the jury by a verdict should have been obtained on these and other circumstances, and the verdict ought to have been found by them on a larger issue than whether the master and the pilot did their best after they found the vessel could not be received into the dock, which I take to be the only finding of the jury. It is clear that the pilot thought that the master was obstinate and determined to do nothing to save the ship.

We cannot find the defendants liable to this damage because the jury were disposed to relieve the captain and the pilot from the odium of a charge of negligence. The verdict of the jury ought to have gone more into the merits in order to fix the defendants with these damages. What the jury did not find, and could not agree upon, was quite as important as what they did find, and the result of their verdict seems to be, "We cannot agree as to the liability of the defendants; but we desire to throw no blame on the captain or the pilot." We are therefore of opinion that the jury have not found enough in point of fact to enable us to decide that the verdict entered for the plaintiff is what would have been their verdict, or (referring to the evidence actually given) ought to have been, if the entire case had been left to them to find a verdict for the plaintiff or the defendant. Looking at the evidence, and the finding of the jury, we cannot come to any conclusion that would make the defendants responsible for any damage done to the vessel. If there was any place of safety to which the vessel might have been taken and could have been taken (which we think is included in the learned judge's question) we think the plaintiff is not entitled to recover. The jury could not agree on an answer to this question. If they had found this question in the affirmative, we think the plaintiff was clearly not entitled to recover, and we presume the

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judge would have directed a verdict for the defendants; but after many hours they could not agree, and it is plain that some of the jury were of opinion in the affirmative. It is true they found that neither the captain nor the pilot were guilty of negligence, but we think it very uncertain what they meant by that finding. They certainly did not mean by that finding inferentially to decide the other question, or they would have found it and not ultimately disagreed about it. If there was a safe place to which the vessel might and ought to have been taken, a verdict for the plaintiff would be a great act of injustice, and we are invited to find this for the jury by a process of reasoning, when the jury would not, apparently could not, and certainly did not, find it for themselves. As to entering a verdict for the defendants there is a similar difficulty (though perhaps not so great, because if the plaintiff does not establish his case the defendants are entitled to a verdict); but we think we cannot be certain what would have been the verdict of the jury, if they had gone into and decided upon the whole case for themselves. We think therefore, there ought to be a new trial.

CHANNELL and PIGOTT, B.B. expressed their concurrence with the judgment of the Lord Chief Baron: the former adding that he had not prepared a written judgment, because he considered that the question of law as to the remoteness of damages, was not ripe for the decision of the Court.

Rule absolute for a new trial.

Attorneys for plaintiff: *Marshall, Westall, & Roberts.*

Attorney for defendants: *Benj. Hunt.*

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Policy of Insurance—Atlantic Cable—Policy on Adventure.

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The plaintiff caused himself to be insured with the defendant in a policy which was a common printed form of a marine policy, filled up with interlineations and marginal additions, and which contained the following words:—"At and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board, and to continue until it be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted each way . . . the ship, &c., goods, &c., shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, at 10*l.* per share:" and, written opposite to the clause "touching the adventures, &c.," the words: "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one half of the cable was saved;—

Held, that the policy was "on the adventure" and not on the cable merely; and that the adventure, that is, "the successful laying down of the cable in one continuous length between Ireland and Newfoundland," having wholly failed, the plaintiff was entitled to recover as for a total loss.

DECLARATION on a policy of insurance dated 29th July, 1865, setting out the policy. It was a policy made on a common printed form of a marine policy, with interlineations and marginal additions. By it the plaintiff, through his agent, caused himself to be insured, "lost or not lost, at and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and *vice versá*, the risk on the policy then to cease and determine, upon any kinds of goods and merchandizes, &c." (in the ordinary words of a marine policy,) the *Great Eastern* being the ship named. "The said ship, &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers, in this policy are and shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, valued at 10*l.* per share."

In the margin, opposite the usual clause, "touching the adventures and perils which we the assurers are contented to bear, and do take upon us in this voyage, they are of the seas, &c.," were

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written the words, "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from Ireland to Newfoundland, and *vice versâ*, and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and *vice versâ*, shall be an essential condition of the policy." The premium was 25 guineas per cent.; the policy contained the usual warranty against average under 3*l.* per cent. unless general.

The declaration then averred that the defendant subscribed the policy for 200*l.*, "and became an insurer thereon to the plaintiff to that amount on the said Atlantic cable and premises;" that the cable was shipped, and that "the plaintiff was then and there, until and at the time of the loss hereinafter mentioned, interested in the said cable to the amount of all the moneys by him insured thereon;" that the ship sailed with the cable on board, and that during the continuance of the risk "the said Atlantic cable was by perils so insured against as aforesaid wholly lost." Averment of performance of conditions precedent. Breach, non-payment.

Pleas:—2. That the plaintiff was not interested in the cable as alleged. 3. That the cable was not lost by the perils insured against, or any of them, as alleged. 4. That the alleged loss of the cable was an average loss, under 3*l.* per cent, within the meaning of the policy, and was not a general average loss, and the ship was not stranded.

Issue thereon.

The case was tried before Martin, B., at the Liverpool Winter Assizes, 1865, and a verdict was found for the plaintiff for 200*l.* The facts are sufficiently stated in the judgment of the Court. (1)

In pursuance of leave reserved at the trial, a rule was afterwards obtained to enter a verdict for the defendant, on the grounds that the loss was not any loss by the perils insured against, or if any, only an average loss, and that there was no evidence that it was higher than 3*l.* per cent; or to reduce the damages, on the ground that, if any loss, it was an average loss.

(1) Post p. 196-7.

Jan. 31. *S. Temple, Q.C.*, and *L. Temple*, shewed cause. The express words inserted in the present policy, distinguish it from that sued upon in *Paterson v. Harris* (1), which was a policy in the ordinary form. There the policy was held to be a policy on the cable, but the present policy is on the undertaking. It is an undertaking in which the plaintiff has an interest, and that interest, on the occurrence of a total loss, becomes the underwriter's salvage. The undertaking has totally failed, and if the attempt to lay the cable be repeated, it will be a new adventure.

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Brett, Q.C., and *Quain*, in support of the rule. First, this was an insurance on the cable, which is not lost. In construing this instrument three rules must be observed. First, it is in form a marine policy, and must therefore be construed as such; second, effect must be given to all the words and stipulations of it taken together; third, the construction must be governed by the construction previously put by the courts upon a similar instrument. It must, therefore, be taken to be a policy on an insurable interest, within the decisions as to insurable interest on marine policies. If it were otherwise, it would be merely a bet, and illegal. What the interest is, is to be seen from the clause, "valued at 200*l.* on the Atlantic cable, value say on twenty shares at 10*l.* per share." These words are similar to those occurring in the policy in *Paterson v. Harris* (1), and it was there held that the policy was a policy on the plaintiff's interest in the cable. It could not be on the shares themselves, which, as was said in that case, could not be put on board ship, and were never in peril from the risks insured against; but their value wholly depends on the cable, and therefore practically an interest in shares is the same as an interest in the cable, and an insurance on the latter secures the former. The doctrine as to abandonment is inapplicable to shares, neither are they within the description given of an insurable interest, in *Arnold, Ins.*, Vol. I., p. 281 (2nd ed.), and by *Lawrence, J.*, in *Lucena v. Crawford*. (2) To construe this again, as a policy on the adventure, would be unreasonable, for if the cable were laid the whole way across, but with a fault capable of being remedied a few miles from the shore, the shares would rise and not fall in value,

(1) 1 B. & S. 336; 30 L. J. (Q.B.) 354.

(2) 2 B. & P. (N.R.) 269—300.

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yet on the plaintiff's contention, the actual adventure having failed, he would recover for a total loss. In these points the case is in effect governed by *Paterson v. Harris* (1), where the policy was substantially in the same terms with this, with the difference that the duration of the risk is here extended. Secondly, the loss is not by the perils insured against; whether the policy is on the cable or on the shares, all that is insured against is loss or deterioration in the value of the cable, or of the shares, by sea perils to the cable. The ordinary sea risks are first enumerated, and the additional words must be interpreted with reference to them; so interpreted, they will mean *extraordinary* sea perils. But the accident here was not due to any sea peril, but to a defect in the cable itself, which made it necessary to take it in; or if that is treated as too remote a cause, it was at least the weight of the cable itself which caused it to part whilst being hauled in. Thirdly, it was not a total loss, whether the cable or the shares formed the subject matter of insurance. It could only be total on the supposition that the insurance was on the adventure, and this, as has been already shewn, would be illegal, as it would be illegal to insure the arrival of a train at a particular time, although interests of great amount might depend on its punctuality. In fact to treat the loss as total it must be said, not that the interest in the adventure is insured, for in that case, the interest still existing, and being of some ascertainable value, the loss would not be total; but that the adventure, apart from the plaintiff's interest in it, that is the adventure considered merely as an event, is insured, which is no more than a wager.

Cur. adv. vult.

Feb. 7. The judgment of the Court (Pollock, C.B., Martin, Channell, and Pigott, BB.) was delivered by

MARTIN, B. This is a rule to enter a verdict for the defendant, in a case tried before me at the last Liverpool assizes. The verdict was entered for the plaintiff for 200*l.*, being a total loss upon a policy of insurance. The facts are these:—The Atlantic Telegraph Company were about to lay down an electric cable between Ireland and Newfoundland. The cable had been put on

(1) 1 B. & S. 336; 30 L. J. (Q. B.) 354.

board the *Great Eastern* steam ship; and it was intended that she should proceed from Ireland to Newfoundland, and convey and lay down the cable as she went along. The *Great Eastern* left Valentia in Ireland on the 23rd July, with 2200 miles in length of cable on board, and on the 2nd August had laid down from 1100 to 1200 miles of it. Upon that day, in consequence of the electric current not acting, some of the cable was being drawn back into the ship, and whilst this was being done a part of the cable which was on board broke, and the broken end fell into the sea. Some fruitless endeavours were made to raise it, but ultimately the *Great Eastern* returned to Sheerness with the remainder of the cable (about 1200 miles in length) on board, where it now is, and it is hoped by the directors that the part saved may be made available for another attempt. The Atlantic Telegraph Company is a joint stock company, and the plaintiff was the owner of 20 shares of 10*l.* each in it. The defendant underwrote a policy on the 29th July for 200*l.*, and the question is whether the plaintiff is entitled to recover as for a total loss, or any smaller sum. The contract between the parties is contained in a paper, which was the common printed form of a marine policy. It states that the plaintiff's agent caused himself to be insured "at and from Ireland to Newfoundland, the risk to commence at the loading of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and *vice versâ*, the risk on the policy then to cease and determine." The ship was the *Great Eastern*. The goods, &c., were valued "at 200*l.* on the Atlantic cable, value, say on 20 shares at 10*l.* per share;" and in the margin, opposite the usual clause (touching the adventures and perils which we the assurers are contented to bear, &c.) there was written as follows:—"It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until 100 words be transmitted from Ireland to Newfoundland, and *vice versâ*; and it is distinctly declared and agreed that the transmission of the

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said 100 words from Ireland to Newfoundland, and *vice versa*, shall be an essential condition of the policy." The premium was 25 guineas per cent., and the defendant underwrote the policy for 200%.

The contract is partly written and partly printed, and the agreement between the parties is to be ascertained by the words of it. The circumstance that it is upon the printed form which is usually adopted for a common marine policy is wholly immaterial, if the language used and adopted by the parties shew that the insurance extends further than marine policies ordinarily do. In the present policy the risk of the insurance is declared to commence from the loading of the cable on board, and to continue until it be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted to and fro, when the risk is to cease and determine. Now, so far, the words express that the subject matter of insurance was the cable, but in the subsequent part of the policy it was declared to be agreed that, in addition to the ordinary perils and casualties insured against in the common marine policy, the insurance was to cover *every risk and contingency attending the conveyance and successful laying down of the cable*. It seems to me that words cannot be used more apt and fit to express that the underwriter contracted to insure against the risk and contingency which has happened, viz., the unsuccessful attempt to convey and lay down the cable. It seems to me that what has occurred is within the very words of the contract: it was a risk and contingency which attended the conveyance of the cable, and the unsuccessful attempt to lay it down. In truth, the policy is not merely on the cable but on the adventure.

The second question is whether the loss be total or partial. I think it total. The adventure in respect of which the assurance was effected was the successful laying down of the cable, which was loaded on board the *Great Eastern*, in one continuous length between Ireland and Newfoundland. This has wholly failed; and in my opinion the circumstance that one half of the cable has been saved is immaterial. The assurance was upon the adventure, and even if it had been merely upon the cable, it was upon the entire continuous cable, and not on a portion of it. A case was cited, *Pater-*

son v. Harris (1), which was supposed to have some bearing upon the point: it really had none whatever. It was an action upon a policy in the common form, and the Court held that what occurred there was not a loss by "perils of the seas." It may possibly be that the loss in the present case it not a loss by perils of the seas; but upon this it is unnecessary to give an opinion, as I think the misfortune which has occurred is distinctly and plainly within the words of the policy, and the risk and contingency against which the defendants contracted to insure.

Rule discharged.

Attorneys for plaintiffs: *Norris & Allen.*

Attorneys for defendants: *Marshall, Westall, & Roberts.*

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Feb. 26.

Copyhold—Easement—Support—Negligence.

The owner of freehold land and copyhold land adjacent to each other sold the copyhold land, and by a deed of even date with the surrender the purchaser covenanted and granted that the vendor, his heirs, &c., might work in the adjoining freehold land, without being liable to make compensation for any injury caused by such working to certain buildings, authorized by the deed to be erected on the copyhold land, and that the purchaser, his heirs, &c., would indemnify the vendor, his heirs, &c., against any claims for such damage. This deed was not entered on the court rolls, nor referred to in the surrender. The copyhold land was afterwards conveyed enfranchised by the purchaser and the lords of the manor to the Church Building Commissioners, under whom the plaintiff took. Neither the lords of the manor, nor the Commissioners, nor the plaintiff, had notice of the deed.

The defendant, who took the adjoining freehold land under the original vendor, having by working the mines in it caused the land of the plaintiff to sink, and damaged the buildings thereon:—

Held, that he was not protected by the above-mentioned deed from liability to make compensation to the plaintiff.

Semle (per Martin, Channell, and Pigott, BB., Pollock, C.B., dissentiente), that if both lands had been freehold the defendant would still have been liable.

DECLARATION: 1st count, That the plaintiff was possessed of land, with a house, out-buildings, and wall thereon, in his own occupation, and by reason of the premises was entitled to have,

(1) 1 B. & S. 336; 30 L. J. (Q.B.) 354.

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and in fact had, the same supported by the land adjacent to, and by the soil and minerals under the same; yet the defendant wrongfully, &c., dug out and removed the land adjacent to, and the soil and minerals out of the plaintiff's land, without leaving sufficient and proper support for the same, whereby the same sank and gave way, and the buildings were injured, and the plaintiff's estate deteriorated.

2nd count, That the defendant so wrongfully, &c., dug and worked mines adjoining land and buildings of the plaintiff, that the plaintiff's land and buildings gave way and sank, and the buildings were injured, and the plaintiff's estate deteriorated.

Plea 3, To so much of the declaration as relates to injury to the house, out-building, and wall, in the first count, and to the buildings in the second count mentioned, that one Bickley was formerly seised in fee of certain lands adjoining the lands in the declaration mentioned, and in which lands (hereinafter called freehold lands) there were mines and minerals; and was also seised in his demesne as of fee, at the will of the lord of the manor of Sedgley, according to the custom of the manor, of the land next mentioned; and that Bickley, being so seised, on the 6th of May, 1834, surrendered the land, being the land with a house, &c., thereon in the declaration mentioned, unto Charles Girdlestone his heirs and assigns, at the will of the lord, according to the custom of the manor, but subject to the provisions contained in a deed of even date.

By this deed Girdlestone, for himself, his heirs, executors, administrators and assigns, covenanted with Bickley, his heirs and assigns, that Bickley, his heirs and assigns, &c., should at all times have full liberty, license, power, and authority, and which liberty, license, power, and authority was thereby given and granted by Girdlestone, to make such and so many roads, levels, &c., in and under the surface of certain land coloured red in an endorsed plan, as might be necessary for the purpose of enabling Bickley, his heirs, &c., not only to get and carry away any mines of coal and ironstone, or other mines or minerals, in or under any other lands belonging to Bickley, but also to carry away any water which might obstruct the working the said last-mentioned mines and minerals, or for any other reasonable purpose whatever,

without being liable to make or pay any compensation to Girdlestone, his heirs, executors, administrators or assigns, for the privilege thereinbefore reserved, and notwithstanding any damage might be done to, or sustained by, Girdlestone, his heirs or assigns in the exercise of such privilege (here there followed a similar power of driving roads, &c., under the land surrendered).

And Girdlestone covenanted that he, his heirs and assigns, should only erect a church or chapel, and house for the use of a minister, and certain other specified buildings, upon the land so surrendered, and, lastly, that in case Bickley, his heirs or assigns, should, in working his or their mines and minerals, in any lands then belonging to Bickley, do any damage to any buildings authorized by the indenture to be erected upon the land so surrendered, then Bickley, his heirs, executors, administrators or assigns, should not be compellable, either at law or in equity, to make any compensation to Girdlestone, his heirs, executors, administrators or assigns, for any such damage; and Girdlestone, for himself, his heirs, executors, administrators and assigns, covenanted to indemnify Bickley, his heirs, executors, administrators and assigns, from and against any such damage, and from all claims and demands to be made by Girdlestone, his heirs, executors, administrators or assigns, for such damage, and from all costs, &c., respecting the same.

The plea then averred that Girdlestone became seised of the said tenements, and that the said tenements, by virtue of the said surrender, and subject to the said covenant afterwards, by divers surrenders and conveyances, became vested in the plaintiff, who thereupon became and was bound by the covenants and stipulations contained in the deed of the 6th of May, 1834; that on the 30th of October, 1841, the freehold land adjoining the land of the plaintiff and the mines therein, were by a deed of that date sold and conveyed by Bickley to Smith and Corser and their heirs and assigns, and were by them, on 24th March, 1863, sold and conveyed to the defendant, his heirs and assigns; that the house, out-buildings, and wall in the first count mentioned, and the buildings in the second count mentioned, were part of the premises erected on the land in the declaration mentioned, in pursuance of the stipulation in the said deed that Girdlestone,

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his heirs and assigns, should only erect thereon a church, &c.; that the damage in the declaration mentioned happened solely in consequence of the defendant's working in the adjoining freehold lands, and not from any working under the land in the declaration mentioned, and that such adjoining freehold lands were the lands mentioned in the first count of the declaration as adjacent to the land, house, out-buildings and wall of the plaintiff, and were the lands which contained the mines in the second count mentioned.

Replication, setting out verbatim the deed of 6th May, 1834, the surrender and admittance (which took no notice of that deed), and a subsequent deed of 4th June, 1836 (being a deed made under the Church Building Acts), by which Girdlestone and the lords of the manor conveyed the copyhold land enfranchised, to the Commissioners for building churches, for the purpose of building a church thereon; averring that the deed of 6th May, 1834, was not entered on the court rolls of the manor, and that neither the lords of the manor, nor the plaintiff, nor the commissioners, had any notice or knowledge of it, prior to the execution of the deed of 4th June, 1836; that a church was afterwards built on the land, and consecrated; that the plaintiff was on 25th October, 1852, presented to the benefice, and lawfully instituted and inducted, and was, before and at the time of the grievances complained of, in lawful possession and enjoyment of the land, house, &c., in the declaration mentioned, as incumbent; that the injuries in the third plea pleaded to were caused by the sinking of the land in the declaration mentioned with the house, &c., erected thereon, as in the declaration mentioned; and that the sinking of the land was not caused by the weight of the house, &c., but solely by the wrongful acts of the defendant in the declaration mentioned.

Demurrer and joinder.

The demurrer was argued in Hilary Term, 1865, by *Macnamara* for the plaintiff, and *Gray, Q.C.* for the defendant, before Pollock, C.B., and Martin and Pigott, BB., but the fact that the plaintiff's land was at the date of the deed of 6th of May, 1834, copyhold, and had been since conveyed *enfranchised* to those under whom the plaintiff claimed, not having been then much insisted on, the case was now re-argued at the request of the Court with reference to that point.

On the present argument the question was also discussed whether, supposing the whole land formerly owned by Bickley, and part of which was conveyed by him to Girdlestone, to have been freehold, the right claimed by the defendant to withdraw support from the plaintiff's land without being liable for the consequent injury was a right which could by law be created so as to run with the lands; and whether, if it could, the deed of 6th of May, 1834, was so framed as to effect that purpose. Upon this point *Gray, Q.C.*, relied upon *Rowbotham v. Wilson* (1) in support of the defendant's right. *Macnamara* distinguished that case from the present, on the ground that it really proceeded on the special words of the act of parliament, and the powers of the commissioners to make the award which was there held valid; he argued that, even if such a grant as was here contended for would be valid between the surface owner and the owner of subjacent strata, (as in *Rowbotham v. Wilson*), where the fact of such separate ownership would be itself notice of some unusual legal relation, it could not be so between the owners of lands lying horizontally adjacent to one another, where nothing but the ordinary rights would be supposed to exist. That further, the words of the deed in the present case were inconsistent with the idea of a *real* right being created by it; and that, in particular, the covenant to indemnify shewed that only a *personal* relation was intended to be constituted. He relied upon *Keppel v. Bailey* (2) and *Ackroyd v. Smith* (3), but no judgment was delivered on these points.

Nov. 8. *Gray, Q.C. (Staveley Hill* with him) in support of the demurrer. The copyhold land was bound by the covenants in the hands of Girdlestone, and of those who took through him as copyhold tenants; and they being so bound could not by acquiring the freehold interest of the lord liberate themselves from that obligation. He referred to *Smith's Leading Cases*, vol. 1, p. 44, (4th ed.), and *Glover v. Cope* (4), *Whitton v. Peacock* (5), there cited.

Macnamara, in support of the replication. The copyhold tenant holds by copy of court roll; the court roll constitutes

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(1) 8 H. L. C. 348; 30 L. J. (Q.B.) 49.

(2) 2 My. & K. 517.

(3) 10 C.B. 164.

(4) 3 Lev. 326.

(5) 3 My. & K. 325.

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his title, and he is bound only by what appears there. A mortgage not entered on the rolls would not bind a purchaser from the mortgagor without notice: *Watkins Cop.* vol. 1; pp. 116-7. Now, the replication states that the deed of 6th of May, 1834, was not entered on the court rolls, nor referred to in the surrender, and that the plaintiff takes under purchasers without notice. The plaintiff would, therefore, not be bound by the deed, even if the right claimed by the defendant were one which a copyhold tenant could confer, and if the plaintiff's rights were only those of a copyholder. But the right is not one which a copyhold tenant could create so as to bind even succeeding copyholders; his act in granting it would be a prejudice to the lord, and an act of waste, and would be itself a cause of forfeiture, as is the granting of a lease, the alienation of the land in any form, working for mines, &c.: *Watkins Cop.*, vol. 1, pp. 326, 331-3. Further, the plaintiff is himself, by virtue of the enfranchisement invested with the right of the lord, who could clearly not be bound by his tenant's act. The lord is not bound to take notice of anything but what appears upon the court rolls, *Peachey v. Duke of Somerset* (1); nor even to admit to a place on the court rolls any unusual provision; he is not compellable to accept a surrender burdened with trusts: *Flack v. Downing College*. (2) Since, therefore, the deed relied upon by the defendant never appeared upon the court rolls it did not bind the lord, nor was it in fact known to those who obtained the enfranchisement. The plaintiff is therefore in the position of a purchaser without notice of the lord's estate, which has passed to him entire and unburdened, and he would be entitled to enjoy this estate freely, even if the deed would have bound him as a mere copyhold tenant: *Watkins Cop.*, vol. 1, p. 362, *Brabant v. Wilson*. (3)

Gray, Q.C., in reply.

Cur. adv. vult.

Feb. 26. The judgment of the Court (Pollock, C.B., Martin, Channell, & Pigott, BB.) was delivered by

MARTIN, B. In this case a question arises between the owners

(1) Str. 447.

(2) 13 C. B. 945; 22 L. J. (C.P.) 229.

(3) Law Rep. 1 Q. B. 44.

of adjacent lands as to the existence of a right to support, and as to the effect of a deed by which that right is supposed to have been affected. The property which now belongs to the plaintiff was, at the time when that deed was executed, of copyhold tenure, but has been since enfranchised; the defendant's land is, and always has been, freehold. The deed in question was executed on the conveyance of the copyhold land by the owner of both properties, who retained the freehold, and by it the surrenderee purported to grant to his vendor the right of disturbing the copyhold lands, by working the mines in the freehold. The case was argued before the Chief Baron, my Brother Pigott and myself in Hilary Term of last year, but the fact that the plaintiff's property had formerly been copyhold was not much alluded to. After that argument a written judgment was very carefully prepared by me, to the effect that, assuming both properties to have been freehold, the right claimed by the defendant did not exist, and that the plaintiff was entitled to recover. With this judgment my Brothers Channell and Pigott concurred, but the Chief Baron dissented from our view, and was of opinion that, assuming both properties to have been freehold, the plea was good, and the defendant entitled to succeed upon it. The case was argued before us a second time in last Michaelmas Term, and it was then insisted that, even if the defendant's contention were tenable on the assumption that both properties were freehold, yet the fact that the plaintiff's land was copyhold made all the difference. We are of opinion that this fact does make a difference, and that the plaintiff is not bound by the deed, even though it were established that in the case of freehold lands such a right could have been conferred by it as the defendant claims. The plaintiff is therefore entitled to the judgment of the Court on this point, and that being so, it is thought better not to read the judgment to which I have referred, the Court not being unanimous as to what would have been the effect of the deed if both the plaintiff's and the defendant's land had been freehold.

Judgment for the plaintiff.

Attorneys for plaintiff: *Benbow, Tucker, & Saltwell.*

Attorneys for defendant: *Hollings, Sharp, & Ullithorne.*

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HAUGHTON AND OTHERS v. EMPIRE MARINE INSURANCE COMPANY
(LIMITED).

Ship and shipping—Marine policy—Construction—“At and from.”

In a homeward policy the words “*at and from*” a port named are to be construed in their natural geographical sense, without reference to the expiration of an outward policy “*to*” the same place, and therefore the policy attaches as soon as the vessel arrives within the port named, and although not *safely moored*.

A vessel insured “*at and from*” Havana was injured by coming in contact with an anchor, after entering the harbour, and whilst passing over a shoal up to her place of discharge:—

Held, that the policy had attached.

DECLARATION on a valued policy of insurance on the ship Urgent, “lost or not lost, *at and from* Havana to Greenock,” alleging that the ship when *at* Havana, and after the commencement and during the continuance of the risk, sustained injury by the perils insured against.

First plea, that the ship did not, when *at* Havana, after the commencement and during the continuance of the risk, sustain injury by the perils insured against.

Issue thereon.

The cause was tried before Montague Smith, J., at the Liverpool Summer Assizes, 1865, when the material facts proved were as follows:

The ship was insured from Nassau to Havana, and went to the latter place with a cargo of coals. The captain proved that he arrived at Havana, and took a pilot inside the harbour; that he then took a steam-tug. His instructions to the pilot were to take him to a clear anchorage. The tug took her up through the harbour and the shipping to a place called the “Regla Shoal,” and when past the thick of the shipping above the city, the ship began to stir the mud, but was not felt to take the ground. The pilot then gave orders to let go the anchor, and that the tug should cast off; the anchor was let go, but the tug held on until the hawser which connected the ship with the tug broke; the pilot then left the ship, and she remained in that place. On the next morning the captain attempted to get her head to wind, but could not, and later in the day found that she had sustained

damage from the anchor of another ship. (1) She was afterwards got off, and her cargo was, by the direction of the purchaser, discharged at a place between the mouth of the harbour and the shoal.

The verdict was entered for the plaintiffs for 353*l.* 3*s.* 1*d.*, and leave was reserved to the defendants to move to enter a nonsuit or a verdict on the ground that the ship was not *at* Havana, within the meaning of the policy, when she sustained the injury, the Court to draw inferences of fact.

E. James, Q.C., in the following Michaelmas Term, obtained a rule nisi accordingly, against which

Brett, Q.C., and *Baylis* (Nov. 22), shewed cause. The ship had arrived *at* Havana, within the meaning of the policy, when the injury was received. The question is one of nautical phraseology, and to be decided by the ordinary use of the terms. Havana, in a policy of marine insurance, means the port of Havana, and the analogy of use shews that the ship was *at* Havana when she passed the mouth and entered the harbour; as a ship is said to be *at* London when she is at Gravesend, *at* Liverpool when she is in the Sloyne, and *at* Dover when she has passed between the piers, though she would be *off* Dover as long as she remained in Dover Roads in the open sea. This construction is favoured by *Bell v. Marine Insurance Company* (2), cited (but mis-stated) in *Phill. Ins.*, s. 933, where a representation that a ship had arrived “*at*” Limerick, was held to be satisfied by her having arrived at Grass Island, nine miles below the town of Limerick, though within the limits of the port. The only qualification to this natural construction is that the ship must arrive at the place named in safety, and it is admitted that the ship was in good physical safety when she entered the port. The defendants seek to add another qualification, namely, that the ship must have been safely moored; but this is an arbitrary addition not warranted by any decision. On the contrary, it is laid down by Lord Hardwicke in *Motteaux v. London Assurance Society* (3), that in a policy “*at and from*,” the words “*first arrival*” are implied; see

(1) There was a conflict of evidence as to whether the ship struck the anchor, and was stopped by it, or whether she settled down upon it on the falling of the tide.

(2) 8 Serg. & Raw. 98.

(3) 1 Atk. 545.

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also *Palmer v. Marshall*. (1) It is accordingly laid down in *Phill. Ins.*, s. 932, that, "in insurance on a vessel 'at' a port, the risk generally commences from the time of its being there;" and *Patrick v. Ludlow* (2) is cited in support of that proposition; Mr. Justice Kent there says, "The true rule on this subject is, that 'at and from,' when applied to a ship, includes the period of her stay in the port, from *the time of her arrival there*. But 'at and from,' when applied to goods, means from the time those goods are put on board the vessel;" see also *Seamans v. Loring*. (3) The physical safety required as a condition of the policy attaching (*Arn. Ins.*, Vol. 1, p. 388 (3rd ed.); *Phill. Ins.*, s. 934) is different from the seaworthiness required for a voyage, and it is only necessary that, "while in port, she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage," per Lord Ellenborough, *Parmeter v. Cousins* (4), *Bell v. Bell*. (5) Lord Kenyon expressly lays down that "seaworthiness" is not necessary; *Smith v. Surridge* (6), *Forbes v. Wilson*. (7) Now there was no period up to the accident at which the vessel in the present case was not in this condition, and, therefore, at the period of the accident the policy had attached, the vessel having then arrived within the harbour. If, however, it were necessary to contend that the vessel was safely moored before the accident, this contention would be borne out by the evidence: *Angerstein v. Bell*. (8)

Potter (*E. James, Q.C.*, with him), in support of the rule. The present policy is a policy for the homeward voyage, including the period of the vessel's stay at the port, and the true construction of it is to make it supplement the outward policy. Now, the outward policy would expire twenty-four hours after the vessel had been safely moored; the period of twenty-four hours is an arbitrary extension of the risk expressed in the outward policies; but the safe mooring shews the period when the ship is considered to have arrived. This period (that is, the time when the outward

(1) 8 Bing. 79.

(2) 3 John. R. 10.

(3) 1 Mason R. 127, 139.

(4) 2 Camp. 235.

(5) 2 Camp. 475.

(6) 4 Esp. 25.

(7) Park. 472.

(8) Park 54.

policy would by the mere effluxion of twenty-four hours expire) is the period at which the policy "at and from" commences. Now, it could not be said that this period had arrived, for the vessel had not reached her destination; she was not at the place of discharge, nor was there any intention on the part of the master of casting anchor at this place as her mooring ground; but it was only in consequence of his thinking that she was grounding on the shoal that the anchor was let go. It resembles, therefore, the case of *Samuel v. Royal Exchange Assurance Company* (1), and that of *Zacharie v. Orleans Insurance Company* (2), cited in *Phill. Ins.* s. 968-9; where, in this same harbour of Havana, a ship which had moored under Moro Castle, one of the headlands at its mouth, twenty-four hours before the accident, was held not to be discharged from an outward policy "to" Havana.

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On 26th of February, Channell, B., said that himself and Pigott, B., concurred in opinion upon the case; that Martin, B., not having heard the whole of the arguments, took no part in the judgment; that they had not been able to ascertain whether the Chief Baron agreed with them; but that as the majority of their Court agreed in opinion, the parties were entitled to have the judgment upon the case. Accordingly the following judgments were delivered:—

CHANNELL, B. This was an action on a valued policy on the ship *Urgent*, lost or not lost, at and from Havana to Greenock, and the question for us to determine is, whether or not the risk had attached at the time when the damage occurred. A verdict was entered at the trial for the plaintiffs, and a rule has been obtained by the defendants to enter a nonsuit pursuant to leave reserved. The facts are before us on the judges' notes and in certain documents admitted in evidence, and we are to be at liberty to draw inferences of fact. It appears that the *Urgent*, having arrived off Havana, the captain engaged the services of a steam-tug and a pilot for the purpose of taking her to a clear anchorage. She was towed into the harbour, past the point where she ultimately dis-

(1) 8 B. & C. 119.

(2) 5 Martin R. (N. S.) 637.

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charged her cargo, to a point at the head of the harbour, called the Regla Shoal. There she grounded, and received damage from the anchor of another ship. In my opinion she was at that time at Havana, and consequently the risk under the policy had attached. The damage occurred at Havana, geographically speaking, and there is nothing which, to my mind, shews that the parties, at the time this policy was underwritten, contemplated any other meaning of the word "at." All the limitation which the law appears ever to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port at which she is insured in a state of sufficient repair or seaworthiness to be enabled to be there in safety: see *Parmeter v. Cousins* (1), and *Bell v. Bell* (2), in the latter of which cases the ruling of Lord Ellenborough, C.J., at Nisi Prius, was upheld by the Court in Banc. Here, however, there seems to be no doubt that the ship was really within the harbour in good safety, and the loss occurred from a peril in the harbour, and in no way from any injuries she had received before her arrival. The ship being insured while at Havana is evidently, in the absence of any provision to the contrary, insured all the time she is there, and therefore the risk commences on her first arrival, as put by Lord Hardwicke in *Motteaux v. London Assurance Company*. (3)

Unless, therefore, we can say that her first arrival at the port is when she cast anchor there, instead of when she enters the port, our judgment must be for the plaintiffs. In many cases the nature of the port may be such that the two events may be identical. There may be nothing to shew the arrival till the vessel casts anchor. But here we have evidence as to the port of Havana which is sufficient, in my judgment, to shew that the arrival was before casting anchor. It has been argued that the first arrival, which must be no doubt in good safety, must be identical with the mooring in good safety usually named in outward policies. But I think we cannot construe the terms of one contract by reference to those of another not referred to in it. And it is clear that there is no usage that the duration of the outward and homeward policies should not overlap, because the outward policy usually extends to twenty-four hours after the vessel is moored in good

(1) 2 Camp. 235.

(2) 2 Camp. 475.

(3) 1 Atk. 545.

safety. During those twenty-four hours there is no question that there is a double insurance, and therefore I see no ground for saying that the parties contracted subject to any usage that such a policy would not attach until the previous one had determined. If they had wished to make such a condition it might easily have been done; or if, having in view any special dangers, as shoals or the like, within the port of Havana, they had chosen to make the risk date from the vessel being moored in safety, they would have done so; but as it stands it is from the first arrival, which, as a matter of fact, I think to be on her entering the port. My judgment is, therefore, for the plaintiffs, that the rule be discharged.

PIGOTT, B., after stating the facts as above, proceeded. The sole question is whether the policy had attached. I am of opinion that it had. I agree with the plaintiff's counsel, that the language used by the parties ought to have a plain construction, and that as the ship had arrived geographically within the harbour of Havana, and was in safety there before the injury was received, the risk then commenced.

A policy of insurance is to be construed by the same rules as other contracts, the duty of the Court being to collect the meaning of the parties by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning which they have not expressed. For the defendants it was argued that, Havana being an outward port as regards this ship, the meaning of the words *at and from* such outward port, was that the risk shall commence when the ship has so far performed her outward voyage that nothing remains to determine the outward policy but the effluxion of the twenty-four hours from her arrival, and that, so understood, this policy had not attached, inasmuch as the ship had not arrived at her place of discharge.

But it seems to me that this would be a very artificial construction to adopt, and we have no safe guide to conduct us to it. It might with equal plausibility be argued that the risk *at and from* a port should not commence till the insurance *to* that port ceased, which is at the end of the twenty-four hours, and not at the commencement of them. The answer to both suggestions seems to be that the construction of this contract cannot depend upon the contents of another and distinct one, which is wholly unconnected

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with it, nor is the Court called upon to know or assume that there is in fact any outward policy in existence.

This view is supported by the authority of Lord Hardwicke, in *Motteaux v. London Assurance Company*. (1) He mentions a case tried before him at Guildhall, in which he says: "It was doubted whether the words 'at and from Bengal' meant the first arrival of the ship at Bengal," and he adds, "it was agreed the words 'first arrival' were implied and always understood in policies." Now there can be no question about the sense in which Lord Hardwicke uses the words *first arrival*, viz., in contradistinction to her being moored in a particular place, or discharging her cargo. In *Parmeter v. Cousins* (2), Lord Hardwicke's report of the above case is mentioned, and the learned reporter adds, "there seems no doubt that the rule laid down by Lord Hardwicke, qualified by the principal case" (to which the note is appended), "is to be considered as established law upon the subject." The qualification thus alluded to is, that the ship shall be once in good safety at the port, a matter not in dispute in the present case.

This doctrine, and the authority for it, is to be found in several of the text books on insurance, and may be thus taken to have been long considered as the meaning of those who so word their policies. In *Arn. Ins.*, Vol. 1 (p. 28, s. 25, 2nd. ed.), it is the form recommended to parties to be adopted for their advantage in protecting the ship from the moment of her arrival.

I do not think it necessary to advert to the other questions raised, viz.; whether in fact the ship had not anchored in the harbour before the damage was sustained, and at a place even further within it than her place of ultimate discharge; nor whether that would make any difference in the case. In my judgment the plaintiffs are entitled to keep their verdict, and the rule should be discharged.

Rule discharged.

Attorneys for plaintiffs: *Norris & Allen.*

Attorneys for defendants: *Chester & Urquhart.*

(1) 1 Atk. 545.

(2) 2 Camp. 235.

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXIX VICTORIA.

PEARCE AND ANOTHER *v.* BROOKS.

Contract—Void for Immorality.

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One who makes a contract for sale or hire with the knowledge that the other contracting party intends to apply the subject matter of the contract to an immoral purpose cannot recover upon the contract; it is not necessary that he should expect to be paid out of the proceeds of the immoral act.

The defendant, a prostitute, was sued by the plaintiffs, coach-builders, for the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment; but the jury found that they knew her to be a prostitute, and supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men:—

Held, that the plaintiffs could not recover.

DECLARATION stating an agreement by which the plaintiffs agreed to supply the defendant with a new miniature brougham on hire, till the purchase money should be paid by instalments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay 50*l.* down; and in case the brougham should be returned before a second instalment was paid, a forfeiture of fifteen guineas was to be paid

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in addition to the 50*l.*, and also any damage, except fair wear. Averment, that the defendant returned the brougham before a second instalment was paid, and that it was damaged. Breach, nonpayment of fifteen guineas, or the amount of the damage. Money counts.

Plea 3, to the first count, that at the time of making the supposed agreement, the defendant was to the knowledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The case was tried before Bramwell, B., at Guildhall, at the sittings after Michaelmas Term, 1865. It then appeared that the plaintiffs were coach-builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution; and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution.

The learned judge ruled that the allegation in the plea as to the mode of payment was immaterial, and he put to the jury the following questions: 1. Did the defendant hire the brougham for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display, to attract men; and that the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage.

On this finding, the learned judge directed a verdict for the defendant, and gave the plaintiffs leave to move to enter a verdict for them for the fifteen guineas penalty.

M. Chambers, Q.C., in Hilary Term, obtained a rule accordingly, on the ground that there was no evidence that the plaintiffs knew the purpose for which the brougham was to be used; and that if there was, the allegation in the plea that the plaintiffs expected

to be paid out of the receipts of defendant's prostitution was a material allegation, and had not been proved: *Bowry v. Bennett*. (1)
[POLLOCK, C.B., referred to *Cannan v. Bryce*. (2)]

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Digby Seymour, Q.C., and *Beresford*, shewed cause. No direct evidence could be given of the plaintiffs' knowledge that the defendant was about to use the carriage for the purpose of prostitution; but the fact that a person known to be a prostitute hires an ornamental brougham is sufficient ground for the finding of the jury.

[BRAMWELL, B. At the trial I was at first disposed to think that there was no evidence on this point, and I put it to the jury, that, in some sense, everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must be not merely such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view. The jury, by the mode in which they answered the question, shewed that they appreciated the distinction; and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the purposes of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients; and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.]

Upon the second point, the case of *Bowry v. Bennett* (1) falls short of proving that the plaintiff must intend to be paid out of the proceeds of the illegal act. The report states that the evidence of the plaintiffs' knowledge of the defendant's way of life was "very slight;" and Lord Ellenborough appears to have referred to the intention as to payment not as a legal test, but as a matter of evidence with reference to the particular circum-

(1) 1 Camp. 348.

(2) 3 B. & A. 179.

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stances of the case. The goods supplied there were clothes; without other circumstances there would be nothing illegal in selling clothes to a known prostitute; but if it were shewn that the seller intended to be paid out of her illegal earnings, the otherwise innocent contract would be vitiated. Neither is *Lloyd v. Johnson* (1), cited in the note to the last case, an authority for the plaintiffs, for there part of the contract would have been innocent, and all that the Court says is, that it cannot "take into consideration which of the articles were used by the defendant to an improper purpose, and which were not;" they had no materials for doing so. The present case rather resembles the case of *Crisp v. Churchill*, cited in *Lloyd v. Johnson* (1), where the plaintiff was not allowed to recover for the use of lodgings let for the purpose of prostitution. *Appleton v. Campbell* (2) is to the same effect.

M. Chambers, Q.C., and *J. O. Griffiths*, in support of the rule. As to the first point, the expressions of Buller, J., in *Lloyd v. Johnson* (3), are strongly in the plaintiffs' favour, especially his remarks on the case of the lodgings: "I suppose the lodgings were hired for the express purpose of enabling two persons to meet there." But in this case it is impossible to say that there was any express purpose of prostitution; the defendant might have used the brougham for any purpose she chose, as to take drives, to go to the theatre, or to shop. Even if there were evidence, the jury have not found the purpose with sufficient distinctness. But secondly, the last allegation in the plea is material, the plaintiffs must intend to be paid out of the proceeds of the immoral act. The words of Lord Ellenborough in *Bowry v. Bennett* (4), are very plain, the plaintiff must "expect to be paid from the profits of the defendant's prostitution."

[BRAMWELL, B. At the trial I refused to leave this question to the jury, but it has since occurred to me that the matter was doubtful. The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall

(1) 1 B. & P. 340.

(2) 2 C. & P. 347.

(3) 1 B. & P. at p. 341.

(4) 1 Camp. 348.

use it. Suppose, however, a person were to buy a pistol, saying to the seller that he means with it to shoot a man and rob him, is the act of the seller illegal, or is it further necessary that he should stipulate to be paid out of the proceeds of the robbery? If the looking to the proceeds is necessary to make the transaction illegal, is it not also necessary that it should be part of the contract that he *shall* be so paid?]

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Suppose a cab to be called by a prostitute, and the driver directed to take her to some known place of ill-fame, could it be said that he could not claim payment?

[BRAMWELL, B. If he could, this absurdity would follow, that if a man and a prostitute engaged a cab for that purpose, and if, to meet your argument, the driver reckoned on payment, as to the woman, out of the proceeds of her prostitution, the woman would not be liable, but the man would, although they engaged in the same transaction and for the same purpose.]

If the contract is void for this reason, the plaintiffs were entitled to resume possession, and to bring trover for the carriage; a test, therefore, of the question will be, whether in such an action, if the jury found the same verdict as they have found here, on the same evidence, the plaintiffs would be entitled to recover.

[MARTIN, B. I think they would; and that if the carriage had not been returned in this case, the plaintiffs would, on our discharging this rule, be entitled to determine the contract on the ground of want of reciprocity, and to claim the return of the article.]

POLLOCK, C.B. We are all of opinion that this rule must be discharged. I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say, that since the case of *Cannan v. Bryce* (1), cited by Lord Abinger in delivering the judgment of this Court in the case of *M'Kinnell v. Robinson* (2), and followed by the case in which it was so cited, I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever

(1) 3 B. & A. 179.

(2) 3 M. & W. at p 441.

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considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other. The rule of law was well settled in *Cannan v. Bryce*(1); that was a case which at the time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to regard with surprise. But the learned judge (then Sir Charles Abbott) who decided it, though not distinguished as an advocate, nor at first eminent as a judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically *his* judgment; it was assented to by all the members of the Court of King's Bench, and is now the law of the land. If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. I cannot go with Mr. Chambers in thinking that everything must be found by a jury in such a case with that accuracy from which ordinary decency would recoil. For criminal law it is sometimes necessary that details of a revolting character should be found distinctly and minutely, but for civil purposes this is not necessary. If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency. I agree with my Brother Bramwell that the verdict was right, and that the rule must be discharged.

MARTIN, B. I am of the same opinion. The real question is, whether sufficient has been found by the jury to make a legal

(1) 3 B. & A. 179.

defence to the action under the third plea. The plea states first the fact that the defendant was to the plaintiffs' knowledge a prostitute; second, that the brougham was furnished to enable her to exercise her immoral calling; third, that the plaintiffs expected to be paid out of the earnings of her prostitution. In my opinion the plea is good if the third averment be struck out; and if, therefore, there is evidence that the brougham was, to the knowledge of the plaintiffs, hired for the purpose of such display as would assist the defendant in her immoral occupation, the substance of the plea is proved, and the contract was illegal. When the rule was moved I did not clearly apprehend that the evidence went to that point; had I done so, I should not have concurred in granting it. It is now plain that enough was proved to support the verdict.

As to the case of *Cannan v. Bryce* (1), I have a strong impression that it has been questioned to this extent, that if money is lent, the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering. But, no doubt, if it were part of the contract that the money should be so applied, the contract would be illegal.

PIGOTT, B. I am of the same opinion. I concurred in granting the rule, not on any doubt as to the law, but because it did not seem clear whether the evidence would support the material allegations in the plea. Upon this point, I think that the jury were entitled to call in aid their knowledge of the usages of the day to interpret the facts proved before them. If a woman, who is known to be a prostitute, wants an ornamental brougham, there can be very little doubt for what purpose she requires it. Then the principle of law expressed in the maxim which my Lord has cited governs the case. It cannot be necessary that the plaintiffs should look to the proceeds of the immoral act for payment; the law would indeed be blind if it supported a contract where the parties were silent as to the mode of payment, and refused to support a similar contract in the rare case where the parties were imprudent enough to express it. The plaintiffs knew the woman's mode of life, and where the means of payment would come from,

(1) 3 B. & A. 179.

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and to require the proposed addition to the rule would be to make it futile. As to the expressions of Lord Ellenborough which have been relied on, I think they were only meant to give an illustration of what would be evidence of the plaintiffs' participation in the immoral act, and that we are not overruling anything that he has laid down.

BRAMWELL, B. I am of the same opinion. There is no doubt that the woman was a prostitute; no doubt to my mind that the plaintiffs knew it; there was cogent evidence of the fact, and the jury have so found. The only fact really in dispute is for what purpose was the brougham hired, and if for an immoral purpose, did the plaintiffs know it? At the trial I doubted whether there was evidence of this, but, for the reasons I have already stated, I think the jury were entitled to infer, as they did, that it was hired for the purpose of display, that is, for the purpose of enabling the defendant to pursue her calling, and that the plaintiffs knew it.

That being made out, my difficulty was, whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense, it was not for the same purpose. If a man were to ask for duelling pistols, and to say: "I think I shall fight a duel to-morrow," might not the seller answer: "I do not want to know your purpose; I have nothing to do with it; that is your business: mine is to sell the pistols, and I look only to the profit of trade." No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should still feel it, but that the authority of *Cannan v. Bryce* (1) *M-Kinnell v. Robinson* (2) concludes the matter. In the latter case the plea does not say that the money was lent on the terms that the borrower should game with it; but only that it was borrowed by the defendant, and lent by the plaintiff "for the purpose of the defendant's illegally playing and gaming therewith." The case was argued by Mr. Justice Crompton against the plea, and by Mr. Justice Wightman in support of it; and the considered judgment of the Court was delivered by Lord Abinger, who says (p. 441): "As the plea states that the money for which the action is brought was lent for the purpose of illegally playing and gaming therewith, at the

(1) 3 B. & A. 179.

(2) 3 M. & W. 434.

illegal game of 'Hazard,' this money cannot be recovered back, on the principle, not for the first time laid down, but fully settled in the case of *Cannan v. Bryce*. This principle is that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced." This Court, then, following *Cannan v. Bryce* (1), decided that it need not be part of the bargain that the subject of the contract should be used unlawfully, but that it is enough if it is handed over for the purpose that the borrower shall so apply it. We are, then, concluded by authority on the point; and, as I have no doubt that the finding of the jury was right, the rule must be discharged.

With respect, however, to the allegation in the plea, which, as I have said, need not be proved, and which I refused to leave to the jury, I desire that it may not be supposed we are overruling anything that Lord Ellenborough has said. It is manifest that he could not have meant to lay down as a rule of law that there would be no illegality in a contract unless payment were to be made out of the proceeds of the illegal act, and that his observation was made with a different view. In the case of the hiring of a cab, which was mentioned in the argument, it would be absurd to suppose that, when both parties were doing the same thing, with the same object and purpose, it would be a lawful act in the one, and unlawful in the other.

POLLOCK, C.B. I wish to add that I entirely agree with what has fallen from my Brother Martin, as to the case of *Cannan v. Bryce*. (1) If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied; but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterwards it was turned to that use, neither *Cannan v. Bryce*, nor any other case, decides that his act would be illegal. The case cited rests on the fact that the money was borrowed with the very object of satisfying an illegal purpose.

Rule discharged.

Attorney for plaintiffs: *E. L. Levy.*

Attorneys for defendant: *Lewis & Lewis.*

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April 17.

BOLINGBROKE AND WIFE *v.* KERR.*Administrator.—Parties—Practice.*

An administrator cannot sue in his representative character upon contracts made after the death of the intestate, in the course of carrying on the intestate's business.

The plaintiffs, husband and wife, sued the defendant for goods supplied to him by them in the course of carrying on the business of the wife's deceased father, whose administratrix the wife was. The goods so supplied were made of materials purchased out of moneys received on account of the intestate's estate:—

Held, that the wife was wrongly joined as a party, and that the husband must sue alone.

THIS was an action for goods sold and work done, brought by the husband and wife, suing in right of the wife as administratrix of her deceased father.

After the death of the father, in April, 1860, the male plaintiff married the daughter, who was then a minor, but who in July, 1861, obtained letters of administration to her father's estate. The plaintiffs continued the business of the father, who was a saddler, and in the course of this business they, in September, 1862, supplied to the defendant the goods in question.

The case was tried at Westminster before Bramwell, B., in Hilary Term last; and it then appeared, from the evidence of the husband, that the business was entirely carried on with money received by his wife from the intestate's estate, and that the goods in question were made of materials bought with money so received, all the old materials having been then used up.

Upon this it was objected, that the husband ought to have sued alone; and the learned judge acceded to the objection, and nonsuited the plaintiffs, reserving leave to move to enter a verdict for them for the amount found by the jury (7*3*l. 10*s.*), the Court to have power to make any amendment which the judge might have made.

Holl, having obtained a rule accordingly,

Willoughby shewed cause. This was a new personal contract with the male plaintiff, on which he could have sued alone, the wife, so far as she was concerned, acting only as his agent. In

Edwards v. Grace (1), there was nothing to shew that the work and labour sued for by the plaintiff as administrator were not done by him in pursuance of a contract made by the intestate, as was the case in *Werner v. Humphreys* (2), where the coat, the price of which was sued for, had been tried on by the defendant before the intestate's death. An administrator has no right to carry on the intestate's business, except for the purpose of winding it up, and completing contracts made by the intestate; and if he does more, he is entitled to sue and liable to be sued, not in his representative, but in his personal capacity. His receipts are not assets in such a sense as to bring him within the rule laid down in 1 Will. Exors. 5th ed. p. 789; that "wherever the money-recovered will be assets, the executor may sue for it, and declare in his representative character;" for although they may be assets in equity, in the sense that he is liable to account for them to creditors or next of kin, as in *Gibblett v. Read* (3), yet they are not such assets as are included in the "goods, chattels, or credits" which the deceased had "*whilst living*," and of which the letters of administration give the disposition to the administrator: see 1 Will. Exors. 5th ed. p. 392. These consist only in the property of the intestate—that is, his goods and his contractual rights, whether complete at the time of his death, or only inchoate, as in *Werner v. Humphreys* (2); and for these only can the administrator sue as such. The Court has no power to make the amendment asked for.

Holl, in support of the rule, relied upon the rule cited from 1 Will. Exors. 5th ed. p. 789, and upon *Cowell v. Watts*. (4)

The Court (Pollock, C.B., Martin, Bramwell, and Pigott, BB.) were clearly of opinion that the husband could only sue in his personal capacity. They further intimated a doubt whether they could amend; but the defendant having by his counsel offered the amount of the debt without costs, this offer was accepted on the part of the plaintiffs, and a *stet processus* was entered by consent.

Attorneys for plaintiffs: *Dod & Langstaffe*.

Attorneys for defendants: *Willoughby & Cox*.

(1) 2 M. & W. 190.

(2) 2 Man. & G. 853.

(3) 9 Mod. 459.

(4) 6 East, 405.

1866

April 21.THE ATTORNEY-GENERAL *v.* UPTON AND OTHERS.*Succession duty—Power—Construction—16 & 17 Vict. c. 51, ss. 2, 4.*

For the purpose of taxation under the Succession Duty Act (16 & 17 Vict. c. 51), the appointee under a general power of appointment, which has taken effect on a death happening, since the commencement of the act, takes a succession from the donee of the power.

Under the will of her husband, who died in 1856, a widow had a life estate in real property, with a general power of appointment by deed or will. She by deed appointed to the use that trustees should, after her death, receive an annuity during the lives of the wife of testator's nephew, and of the children of the nephew by her, on trust for the separate use of the wife. Both the testator's nephew and his wife were strangers in blood to the testator's widow:—

Held, that under section 4 of the Succession Duty Act, the nephew's wife took the annuity as a succession from the testator's widow, and not from the testator himself, and that therefore a duty of 10 per cent. was payable.

Semble, per Bramwell, B., that the result would have been the same under section 2.

INFORMATION, claiming succession duty under the following circumstances:—Admiral Fanshawe, by his will, dated 14th of April, 1851, devised certain lands to the use of his wife, Caroline Fanshawe, for life, remainder to such uses as she should by deed or will appoint, and in default of appointment, to uses for the benefit of the testator's nephews, C. S. Fanshawe and J. F. Fanshawe, and their issue.

The testator died on the 9th of August, 1856; his wife survived him, and on the 3rd of August, 1858, by deed poll appointed the lands in question to the use, after her death, that the defendants A. T. Upton, R. B. Upton, and H. T. Jenkinson, and the survivors, &c., should, during the lives of Elizabeth Fanshawe, the wife of J. F. Fanshawe (the testator's nephew), and all and every the child or children of J. F. Fanshawe by Elizabeth Fanshawe, and the life of the longest liver, yearly receive an annuity of 200*l.*, free from deduction, to be charged on the same lands, and to be payable quarterly, the first payment to be made at the expiration of six calendar months after the death of Caroline Fanshawe, the appointor. The annuity was to be held on trust for Elizabeth Fanshawe during her life for her separate use.

Caroline Fanshawe died on the 12th of May, 1863, leaving

Elizabeth Fanshawe surviving, on whose behalf the defendants entered into receipt of the annuity.

The Crown claimed duty at the rate of 10 per cent., insisting that the predecessor was Caroline Fanshawe, who was a stranger in blood to both Elizabeth Fanshawe and her husband. The defendants, on the contrary, insisted that Elizabeth Fanshawe's interest was derived from Admiral Fanshawe, her husband's uncle, and that therefore only 3 per cent. was payable; and they also insisted that no duty was payable at all.

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The Attorney-General, The Solicitor-General, Locke, Q.C., and Pemberton, for the Crown. The analogy of the Legacy Duty Act (36 Geo. 3, c. 52), to which the Succession Duty Act (16 & 17 Vict. c. 51) is a supplement, favours the construction contended for by the Crown, on both points. By s. 18 of the former act, where property is given for a limited interest with a general power of appointment, duty becomes payable on the execution of the power as if the property had been immediately given to the donee of the power, deducting what may have been already paid in respect of the limited interest; and by s. 7, any gift by will which has effect out of any personal estate which the testator has power to dispose of as he shall think fit, is to be deemed a legacy. Under these sections it was held in *Drake v. Attorney-General* (1), that on the execution of a general power, double duty was payable; one duty under s. 18, by the donee of the power, as for property given to him by the donor, another under s. 7 by the appointee, as for a legacy given to him by the donee. In *Attorney-General v. Brackenbury* (2), it was even held that appointees under a power of appointment, who were also the persons named to take in default of appointment, could not elect, but were bound to pay duty as upon a legacy taken from the donee. The functions of s. 4 and s. 2 of the Succession Duty Act, correspond respectively with those of s. 18 and s. 7 of the Legacy Duty Act. It may be conceded that in the case of powers not taking effect after the commencement of the act, and therefore, by the decision of the case of *In re Lovelace* (3), not within s. 4, the estate taken by an appointee

(1) 10 Cl. & Fin. 257.

(2) 1 H. & C. 782; 32 L. J. (Ex.) 108.

(3) 4 De G. & J. 340; 28 L. J. (Ch.) 489.

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is by the rules of law to be considered as part of the original estate of the donor of the power, and not as derived from the donee. This seems to be admitted in *Attorney-General v. Gardner* (1), and also by Lord Cranworth in *Wallace v. Attorney-General* (2), where, in deciding that succession duty was not payable on property derived from a person of foreign domicile, he distinguishes the cases of *In re Lovelace* (3), and *In re Wallop's Trust* (4), on the ground that in those cases the property was appointed under a power, and was therefore to be taken as derived from the donor of the power, who was an Englishman, not from the donee, who was by domicile a foreigner. In *In re Barker* (5) the same doctrine was rather admitted than argued, and the opinion of Lord Kingsdown in *Lord Braybrooke v. Attorney-General* (6), is to the same effect. But granting this, the present case is not within the authority of those decisions or dicta; for all the cases cited were cases of powers taking effect before the commencement of the act, and were therefore left to the operation of s. 2, interpreted by the ordinary rules of legal phraseology. But the power here came into existence only on the testator's death in 1856, and as to powers taking effect since the act, s. 4 provides, that any person having a general power of appointment, "shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power." Caroline Fanshawe, therefore, by the exercise of her power, made this annuity of 200*l.* for purposes of taxation her property, and Elizabeth Fanshawe, taking it on her death, must be deemed to have derived it from her.

[MARTIN, B., referred to s. 33 of the Succession Duty Act.]

That section is only intended to do what, in the Legacy Duty Act, is effected by the words in s. 18, "after allowing any duty before paid in respect thereof." Duty on the limited interest is paid when that interest is taken, and that duty is afterwards deducted from the duty payable by the donee on the execution of

(1) 1 H. & C. 639; 32 L. J. (Ex.) 84.

(2) Law Rep. 1 Ch. App. at p. 9.

(3) 4 De G. & J. 340; 28 L. J. 404.

(Ch.) 489.

(4) 1 De G. J. & S. 656; 33 L. J. (Ch.) 351.

(5) 7 H. & N. 109; 30 L. J. (Ex.)

(6) 9 H. L. C. 150.

the power, so far as the interest created by the power is identical with the limited interest.

Bovill, Q.C., for the defendants. First, no duty is payable at all; the case of *Drake v. Attorney-General* (1) is no authority, for the words of the Legacy Duty Act are clear; but a tax cannot be imposed merely by analogy to another statute, or by inference from inadequate expressions. Even if the opinion of Wood, V. C., in *In re Lovelace* (2) that s. 4 is the only section of the act touching successions under powers, is not correct, yet, in cases which do fall under s. 4, that is the only section applicable. Now it is agreed that this power is within s. 4, and according to the argument of the Attorney-General in *In re Barker* (3), no duty is payable, because the donee has not made an appointment in her own favour: but if that construction is unsound, still the section only makes the execution of the power operate to charge the donee in respect of the interest he creates, but does not touch the interest of the appointee. But, secondly, if any duty is payable, it is only on a succession taken from Admiral Fanshawe, the donor of the power. The operation of s. 4 is exhausted in making the donor of the power a successor, and any estate taken under the power is left to the operation of s. 2, as *In re Lovelace* (2) and *In re Barker* (4), and of the usual legal rules of construction. But how can the defendants be said to derive an interest from Caroline Fanshawe, in whom no estate, except a life estate, ever existed?

Hannen, on the same side. The rule is strict and technical that the appointee takes under the donor of the power, and to get rid of the operation of this rule a clear provision to the contrary must be shewn. It is admitted that the exercise of this power is within s. 4, but the question is, to what extent is it within it? It is within it to this extent, that the donee having exercised the power is to be deemed to have taken the appointed interest from the donor. But in this the whole object of that branch of the section which relates to general powers is accomplished. The object of the whole section was to shew, in respect of the donor of a power, who was to be deemed his successor; in the first branch it makes his successor the

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(1) 10 Cl. & F. 257.

(3) 7 H. & N. at p. 113.

(2) 4 De G. & J. 340; 28 L. J. (Ch.) 489.

(4) 7 H. & N. 109; 30 L. J. (Ex.) 404.

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donee of a general power exercising it, who, as taking no legal interest in the property, would otherwise have paid no duty; in the second branch, it makes his successor any person taking under a power limited by the donor in favour of a class of which the appointee is a member. For the purpose, then, of taxing the donee of a general power, it deems him to be entitled to the interest appointed by him *as a succession*; but it gives him the property for no other purpose, and the use of the words *as a succession* shews that this is all the section contemplates. The case is therefore left to the 2nd section, and is the same as though the power had taken effect before the act; and the rule recognised by the Attorney-General in *In re Barker* (1) and *Attorney-General v. Floyer* (2), and which the Crown has found it for its interest hitherto to maintain, must govern.

The Attorney-General in reply. There is nothing in the act to favour the limited construction put upon s. 4 by the Attorney-General in *In re Barker*. (1) To support that construction, or the construction now suggested by the defendants, it would be necessary to introduce words into the section limiting the operation of the words used. Those words are apt, for without some transmitted property the idea of a succession does not arise; but when the act treats the donee as entitled to the property appointed, it inevitably follows that the appointee derives his interest from the person who is declared its owner.

POLLOCK, C.B. I am of opinion that the Crown is entitled to duty at the rate of 10 per cent. The case of *In re Barker* (1) was cited to the contrary, but the distinction pointed out by the Attorney General that the power there was created before the act, and was therefore (on the authority of *In re Lovelace* (3)) not within s. 4, shews that that case has no bearing on the present one. The act is remarkably well drawn, and shews a great knowledge of the subject matter to which it applies, and of the means of producing the results intended by its framers. The real property

(1) 7 H. & N. 109; 30 L. J. (Ex.) 404.]

(2) 9 H. L. C. 477; 31 L. J. (Ex.) 404.

(3) 4 De G. & J. 340; 28 L. J. (Ch.) 489.

law of this country is confessedly an extremely complicated system, and the peculiar difficulty which the act has to meet here is caused by the difference which the law recognises between an estate in fee, and an estate for life coupled with a general power of appointment. In substance the interest is the same, in power of enjoyment and in power of disposition; but there is a real distinction in the fact that the owner of a life-interest coupled with a power must, in order to secure the fee to his heirs, actually exercise the power; otherwise it will pass to those to whom it is limited in default of appointment. If, however, he does exercise the power, he is in substance doing the same thing as if he conveyed a fee vested in himself. The question to be decided is, from whom do the appointees under the deed executed by Mrs. Fanshawe derive their interest within the meaning of the act? and Mr. Bovill asks, how can they be said to derive from Mrs. Fanshawe an estate which according to the technical rules of law she never had? But the answer is, that having a life estate with a power to appoint the fee, she was entitled if she chose to take the one and leave the other. If she accepted and enjoyed only the life estate, that was the only interest on which she had to pay duty, the remainder went by the disposition of the testator; but if she chose to exercise the power, she then, by the words of s. 4, made it her property, and is to be considered to have taken an interest equal to the interest which she appointed. The duty then becomes payable under s. 2 on the appointed interest, as property derived from her; and although, if the case were left to the operation of s. 2, a duty of 3 per cent. only might perhaps be payable, by reason of the technical rule of law, which makes the estate of the appointee a part of the fee previously in the donor of the power, yet being brought within s. 4, that section operates to make the property property of the donee, and the succession a succession in which she is the predecessor.

MARTIN, B. I was at first inclined entirely to agree with the Attorney-General, but the argument of Mr. Hannen made considerable impression on me, and I am not clear that he is not right, though I am not so satisfied of it as to differ from the rest of the Court. If the matter stood only on s. 2, the appointee would, by the rule of law, be liable as taking from the settlor, but (the

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intervening third section relating to another matter) s. 4 may be read as coming immediately after s. 2, and it is contended that the whole ought to be taken together as providing that in the case of general powers, to which the first part of the fourth section applies, the donee of the power exercising it shall be considered a predecessor of the interest which he appoints, or that, in other words, the statute creates in the donee of the power for the purposes of taxation an interest equal to the whole interest which is given by him to the person taking under the power. I cannot say that this is an unreasonable construction, although I was struck with the contrary argument. With respect to *In re Barker* (1), I remember that on that occasion the matter was scarcely discussed, but the amount of 3 per cent. being conceded by the counsel for the defendants, more was not claimed on behalf of the Crown.

BRAMWELL, B. I also think that the Crown is entitled to judgment for duty at the rate of 10 per cent., and in my opinion the case is very clear. I am not concerned to maintain my opinion in *In re Barker* (1) (though I think it was right), for I did not then understand the distinction on which the Attorney-General now relies; but in the present case, either under s. 2 or under s. 4, the Crown is entitled to the duty claimed. It is conceded that the objection is a purely technical one, and that if the estate had been devised to Mrs. Fanshawe in fee, and she had then granted or devised the annuity to the defendants, duty at the rate claimed by the Crown would have been payable at her death; but it is contended that this difference in the form of the devise makes a difference in the duty payable. But we must remember, as was said by Lord Campbell in *Lord Saltoun's* case (2), and in *Braybrooke v. Attorney-General* (3), that this act extends to Scotland as well as to England, and that, to use his words, the question is, whether "in popular language, and substantially," the defendants derive an interest from Caroline Fanshawe. Now, it is said that as a matter of legal technical expression, the appointee takes under the donor, not under the donee of the power, and if it is necessary to construe the act by these rules, we must yield to the argument for the defendants. But in s. 2 the words are not technical; that

(1) 7 H. & N. 109; 30 L. J. (Ex.) 404. (2) 3 Macq. 659; 7 H. & N. at p. 116.

(3) 9 H. L. C. 150.

section provides that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition . . . a succession." Now, will these annuitants take *by reason* of the will of Admiral Fanshawe? We must look, not at the *causa remota*, but at the *causa proxima*, and that is the disposition of Caroline Fanshawe. Again, the act says that the term predecessor "shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." From whom then is the interest derived? As I said in *Barker's* case (1), these are ordinary English words, and ought to be construed by lawyers as ordinary Englishmen would construe them. Now, not one man in a hundred would say that this interest was derived from Admiral Fanshawe, or from any other person than the donee of the power. I do not mean to deny or attempt to cast any doubt on the rule of law, that an appointee takes his estate from the donor of the power; but I say that it is a rule not applicable to the construction of this statute; and it is not true, as is supposed, that there is any decision of the House of Lords to the contrary.

But if I am wrong in this, the Crown is inevitably entitled under s. 4; for, though I appreciate the argument which was very clearly put by Mr. Hannen, that the object of the section was to determine when the donee of a power was, and when he was not, to be considered successor to the donor, and that the words must be interpreted with reference to this governing intention, yet when it is said that the donee of a power "shall be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed," it follows that from that time he is made a new terminus of succession. Suppose a devise to A. for life, with a general power of appointment to B., who appoints to himself for life, remainder to C. in fee: from whom does C.'s interest come? Not from the testator, because by the very words of the statute B. has already been made successor to him as to the whole fee, after A.'s life estate. It must then be from B., who is taken by the exercise of the power to have acquired the fee as his own.

(1) 7 H. & N. at p. 116.

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PIGOTT, B. I also think that upon the construction of ss. 2 and 4, read together, the Crown is entitled to a 10 per cent. duty. Probably if s. 2 stood alone it would be otherwise; but it is unnecessary to discuss this, for in my judgment s. 4 clearly gives to the donee of the power an interest in the estate appointed. On the exercise of the power the section creates an interest in the donee, and having once vested that estate in her without any qualification, it must be taken to be hers for all purposes of taxation, and to be transmitted from her to the defendants. Then from whom is the succession derived? It must be from her, and to hold otherwise would be inconsistent with the words of the statute, and would require us to import qualifying words into the section which are not there. I cannot see anything which should induce us to depart from the ordinary meaning of the words, which follows the substance of the transaction.

Attorney for the Crown: *Solicitor of Inland Revenue.*

Attorneys for defendants: *Upton, Johnson, & Upton.*

April 23.

BLUMBERG AND ANOTHER v. ROSE AND ANOTHER.

Debtor and Creditor—Bankruptcy—Deed of Arrangement—Assenting and Non-assenting Creditors—Inequality.

To an action on a bill of exchange the defendants pleaded a composition deed, entered into between themselves, a trustee, and the several persons whose names were set forth in the schedule to the deed annexed, whereby it was provided that the scheduled creditors should each receive three promissory notes payable at different dates, to secure the payment of the composition agreed on, and that the trustee should receive and hold similar promissory notes to be handed upon demand to non-assenting creditors, amongst whom were the plaintiffs. There was no provision requiring a tender of these notes to be made to non-assenting creditors:—

Held, that although there was some practical inequality in the position of the creditors named in the schedule, and of the non-assenting creditors, there was no such inequality as vitiated the deed.

DECLARATION on a bill of exchange drawn by the plaintiffs and accepted by the defendants, and for money payable on accounts stated.

Plea, That after the accruing of the causes of action in the declaration mentioned, the defendants being indebted to the plaintiffs and to divers other persons, a deed was entered into between the defendants and their creditors and a trustee in the words following :—

This indenture, made between George Rose and James Rose (the defendants), hereinafter styled “debtors,” of the first part; Samuel Davis, hereinafter styled the “trustee,” of the second part; and the several persons whose names or firms are set forth in the schedule hereto annexed, hereinafter styled “creditors,” of the third part; whereas the said debtors, being unable to meet their engagements with their creditors, have proposed to pay them a composition of twelve shillings and sixpence in the pound, by giving them respectively three joint and several promissory notes payable at six, nine, and twelve months from the date hereof; which said several promissory notes the creditors have agreed to take in full satisfaction and discharge of their respective debts; and whereas the said composition to be secured by the said promissory notes is payable to creditors who have not assented to these presents, and such promissory notes have been deposited with the said trustee, to be held by him in trust to deliver the same respectively to such last-mentioned creditors respectively on demand as the said trustee doth hereby acknowledge; now this indenture witnesseth, that, in consideration of the premises, each of the said creditors who shall have executed or otherwise assented to, or who shall be bound by these presents, for himself and his partners, &c., doth hereby release the said debtors, their heirs, &c., from all debts due and owing by the said debtors to such creditors. (Then followed several further clauses immaterial to the present decision.) Averments of the due execution and registration of the deed as required by the Bankruptcy Act, 1861; that the plaintiffs were creditors of the defendants in respect of the debt sued for, and all things, &c., having been performed, that they became and were bound by the said deed as if they were parties thereto; that the said promissory notes were deposited with the said trustee, and all things done necessary to make the said deed operate as a valid release of the said debts of the plaintiffs.

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Demurrer and joinder.

Holl, in support of the demurrer. The deed pleaded is invalid. There is an inequality between the plaintiffs, who are non-assenting creditors, and the scheduled creditors who have assented. The latter get the notes securing their composition handed over to them directly, while the non-assenting creditors are obliged to demand their notes of the trustee.

[BRAMWELL, B. Does the principle that inequality vitiates a deed apply where the debtor does the best he can for non-assenting creditors, but something more for those who assent?]

Here the debtor has not done the best he could. A clause should have been inserted in the deed requiring a tender of the notes to be made to non-assenting creditors. Without such a provision they have no notice that the notes are deposited with the trustee to secure their composition.

Joyce, contra, was not called upon.

POLLOCK, C.B. I am of opinion that our judgment should be for the defendants. It seems to me clear that this deed does not contain that kind of inequality which is contemplated by the statute. It is impossible where there are two sets of creditors, one assenting, the other non-assenting, but that there should be some degree of practical inequality. But to a deed equal in principle inequality in effect is no objection.

MARTIN, B. I am of the same opinion. This sort of inequality is, I think, necessarily incident to the position of a non-assenting creditor, and, moreover, there is nothing in the act compelling the debtors to do what it is argued in this case it was their duty to do.

BRAMWELL, B. I am of the same opinion. It may be that in such a case as this the non-assenting creditor is in a worse position than the assenting creditor. But the inequality seems to me to be only that sort of inequality which the statute contemplates. There is not a word in the statute requiring every creditor to have notice of the contents of a deed, or to give creditors an opportunity of considering whether or no they will accept the proffered composition. Perhaps it would be well if there were some such

provision, but there is none, and therefore under the statute we are bound to hold this deed good.

FIGOTT, B., concurred.

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Judgment for the defendants.

Attorneys for plaintiffs: *Dodd & Longstaffe.*

Attorney for defendants: *J. T. Miller.*

MANNING v. TAYLOR AND OTHERS.

April 25.

Will—Devise—Gift of fee-simple without words of limitation.

By a will dated before the Wills Act (1 Vic. c. 26), the testator, who had purchased two undivided fourth parts of certain lands, previously held in quarters, devised to J. M., without words of limitation, "all my undivided quarter of three fields," describing them as then on lease for three lives:—

Held, that the devise carried the fee.

SPECIAL case in an action of ejectment brought for the recovery of an undivided fourth part of certain lands called Castle Hayes.

In 1799, one John Hellyer purchased two fourth parts of Castle Hayes, which had been previously held in undivided fourths. By his will, dated 23rd of April, 1801, he devised as follows:—"I give unto Joseph Manning, son of my daughter, Elizabeth Manning, all my undivided quarter of three fields, in the parish of Plympton Maurice, and are at lease to Miss E. Palmer on three lives; conventional rent, 13s. 4d.; heriot, 10s. 4d., on each life dying; known and commonly called Castle Hayes, to be received by the said Joseph Manning, or his father for him."

He had previously devised his other "undivided quarter" to his daughter, Mary Lane, for life, and after her death to her son, Joseph Lane, without words of limitation.

After giving legacies to John Lane, husband of his daughter Mary, and Richard Manning, husband of his daughter Elizabeth, he proceeded: "I appoint you, the said J. Lane and R. Manning, immediately after my death, to receive the rents of all I have given your children, as it shall come into hand, and to keep the house [the subject of a devise to J. Manning] in good repair, and to pay for their schooling, clothing, and binding them apprentice;

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to keep a just account, and, as they attain each of them their full age of twenty-one years, to pay to each of them the money due." And he appointed them executors.

The will contained many devises, in several of which the *fee* was given by that word. Amongst the devises was one of "my moiety" of Clawland to R. M.; and another of "the fee of my moiety of Wedgers Parks, immediately after the death of the lives now on it," to John M.

The testator died in 1802. Joseph Manning entered into possession of the lands devised to him, and died in 1846, having by his will, dated the same year, devised all his real and personal estate to his wife Mary absolutely. After his death, persons claiming to be the heirs-at-law of the testator, and under whom the defendants claim, took possession of the lands, which they retained till the death of Joseph Manning's widow in 1864. In that year, the plaintiff, who was the only son of Joseph and Mary Manning, and her heir, commenced this action; and the question for the Court was whether, under the devise above set out, Joseph Manning took an estate in fee, or an estate for life. If the former, the judgment was to be for the plaintiff; if the latter, for the defendants.

Joshua Williams, Q.C. (*Anstie* with him), for the plaintiff. The devise of an "undivided quarter" gives the fee without words of limitation; the word "quarter" being understood to refer, not to the material object of the devise, but to the testator's estate in it, by a rule similar to that which makes the word "estate" carry the fee, though coupled with a word of local description: *Phillips v. Allen*. (1) In *Bebb v. Penoyre* (2), Lord Ellenborough would have held, if it had been necessary so to decide, that the word "share" carried the fee, and the Court of King's Bench did so decide in *Paris v. Miller*. (3) In the latter case, Lord Ellenborough relies upon the fact that what the testator gave was held by him as a share, and was not a portion carved out by himself; and that remark is applicable to the present case. The cases of *Montgomery v. Montgomery* (4) and *Green v. Marsden* (5) are to the same effect. Following these

(1) 7 Sim. 446, 457, 467.

(2) 11 East. 160.

(3) 5 M. & S. 408.

(4) 3 Jones & Lat. 47, 61.

(5) 1 Drew. 646, 653.

cases, the Court of Common Pleas, in *Doe v. Fawcett* (1), held that a gift of "my moiety" carried the fee, and that case is in substance indistinguishable from the présent. The words at the end of the devise are explained by the concluding words of the will. That the testator elsewhere gives the *fee* does not prevent the word quarter from having its proper operation, as is shewn by the cases of *Ibbetson v. Beckwith* (2) and *Uthwatt v. Bryant* (3), where the same argument was not allowed to control the effect of the word "estate." He referred to Jarm. Wills, vol. ii., p. 257 (3rd ed.).

Mellish, Q.C. (*Lopes* with him), for the defendants. The word quarter is a word of ambiguous signification, and must be interpreted by the context: the concluding words of the devise, the gift elsewhere of the fee by proper words, especially in connection with the word *moiety*, and the reference to the rent, all shew that a life estate only was intended to be given to Joseph Manning. The remarks of Lord Ellenborough in *Paris v. Miller* (4) are applicable in favour of the defendants, because the testator, by the purchase of the two quarters, became seised of a moiety; and his devise of this moiety by quarters is a "carving out of shares." He cited *Fawcet's* case. (5)

Joshua Williams, Q.C., in reply, was stopped.

MARTIN, B. Our judgment must be for the plaintiff. Mr. Jarman (Wills, vol. ii., p. 247, 3rd ed.), after stating the rule that a gift of land without words of inheritance only confers an estate for life, which he describes as a "rule of construction entirely technical" (p. 248), and after enumerating various exceptions to it, and stating the alteration made by the Wills Act (1 Vict. c. 26, s. 28), adds (p. 266) that "the restricted construction rarely accords with the actual intention of the testator." The Courts, seeing this, before the statute seized on everything that could enable them to distinguish a devise without words of limitation from a simple devise of lands, and gave to certain particular words the effect of carrying the fee, by referring them exclusively to the testator's legal interest. There is nothing in this will that throws any light

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(1) 3 C. B. 274. (2) Cas. t. Tal. 157. (3) 6 Taunt. 317.

(4) 5 M. & S. 408. (5) 8 Vin. Ab. Devise L. a. pl. 11.

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on the testator's intention, beyond the clause containing the devise in question; but something may be said as to the character of the subject of devise. It was a reversion of two-fourths of three fields, expectant on the determination of a lease for lives; and, bearing this in mind, we may infer that when the testator devised this undivided quarter, he must have meant to refer, not to the land, which was not in his actual possession, but to his reversion in it—that is, to his legal estate or interest. If he had used the word reversion, this would have been clearly so, and substantially he has done the same thing. Therefore, even without the case in the Common Pleas, I should have come to the conclusion that this devise would have passed the fee; but it is impossible to distinguish the word “moiety” from the words “undivided quarter” for this purpose; and if one carries a fee, so must the other. The only explanation of the matter is that the Courts at first established an arbitrary rule in favour of the heir, and afterwards established an arbitrary exception to that rule in favour of the intention of the testator.

BRAMWELL, B. I entirely agree. Apart from authority, I should have been of the same opinion: the final clause is fully explained by the fact that the land was on lease, and that the devisee was a minor; and the testator's intention is clear. But the case cited is entirely in point, and concludes the matter.

PIGOTT, B. I also think that the case cited is conclusive, and am glad to follow it.

Judgment for plaintiff.

Attorneys for plaintiff: *Vizard & Anstie.*

Attorneys for defendants: *Surr & Gribble.*

MANGAN v. ATTERTON.

Negligence—Dangerous Instrument—Public Place.

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The defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. The plaintiff, a boy four years old, by the direction of his brother seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed:—

Held, that the plaintiff could not maintain any action for the injury.

APPEAL from the Staffordshire County Court at Lichfield.

The plaintiff sued for injury caused to him by a machine of the defendant, under the following circumstances. The defendant, who is a whitesmith at Sheffield, was accustomed on market days to expose goods for sale in the public street; and on the day of the accident he exposed amongst them a machine for crushing oil-cake, unfenced and without superintendence. The machine was turned by a handle on one side of it, and on the other side the cogs which worked the crushing rollers were exposed; the handle might have been, but was not, secured by wire. The plaintiff, a boy of four years old, was coming past the machine from school, in company with his brother, of the age of seven years (to whose charge his mother had entrusted him), and with other lads; and whilst one of the lads was turning the handle, the plaintiff, by the direction of his brother, put his fingers in the cogs, which so crushed them as to make their amputation necessary.

The county court judge directed the jury that if they thought the machine was dangerous, and one that should not have been left unguarded in the way of ignorant people, and especially children, without, at all events, the handle being removed or fastened up and the cogs thrown out of gear, they should hold the defendant liable for such damages as they might think right.

The jury inspected the machine, and gave a verdict for the plaintiff, damages 10*l*. The defendant appealed.

Macnamara, for the defendant, contended that there was no

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evidence of negligence on his part, and that the boy's own act was the cause of the accident, and cited *Hughes v. McFie*. (1)

Staveley Hill, for the plaintiff, distinguished that case from the present, on the ground that there the boys were joint actors, but the plaintiff here acted under the direction of his brother, and was, from his extreme youth, no more accountable for his actions than a person blown against the machine.

Macnamara was not called on to reply.

MARTIN, B. Even if the defendant was guilty of any negligence in placing the machine where it was, as to which I say nothing, his act was too remote a cause of the mischief to make him liable. The accident was directly caused by the act of the boy himself.

BRAMWELL, B. The defendant is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor? This shews that it is impossible to hold the defendant liable. But further, I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called wilfully mischievous? If that could not be said, then it is not negligence, for between negligence and wilful mischief there is no difference but of degree.

PIGOTT, B., concurred.

Judgment for the defendant.

Attorney for plaintiff: *Thistlethwaite*.

Attorneys for defendant: *J. & C. Cole*.

KRAMER v. WAYMARK.

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May 1.

Practice—Death of plaintiff between verdict and judgment—New trial—Stay of proceedings—17 Car. 2, c. 8, s. 1—15 & 16 Vict. c. 76 (C. L. P. Act, 1852), s. 139.

An action for negligence was brought by the plaintiff, a child of seven years old, by his next friend, to recover damages for injuries done to him by the horse of the defendant. The jury found a verdict for 150*l*. Nine days after the trial the child died. Judgment was afterwards signed by the next friend. An application to stay proceedings, or for a new trial, was then made on the ground of the death of the plaintiff since the trial:—

Held, first, that although the damages were presumably given on the supposition that the child would continue to live, the case was not one in which the Court would grant a new trial; secondly, that the death of an infant plaintiff in an action for negligence between verdict and the signing of judgment was no ground for a stay of proceedings, if judgment had been signed within the time specified in 17 Car. 2, c. 8, s. 1, and the C. L. P. Act, 1852, s. 139.

Palmer v. Cohen, 2 B. & Ad. 966, followed.

THIS was an action for negligence, brought on behalf of a child of seven years old, by his next friend, to recover damages for injuries sustained by the child from a kick of one of the defendant's horses. The defendant pleaded not guilty. At the trial before Erle, C.J., at the last Surrey Spring Assizes, it was proved that the injuries, which were to the eye, skull, and brain, were very severe, that they had entailed acute suffering on the plaintiff, and that their effect would probably be to incapacitate him from ever obtaining a living in the ordinary way. He had been in the Royal Free Hospital from the 4th of July, 1865, the day of the accident, to the 14th of October, 1865, and from that time to the 28th of March last, the day of the trial, continued an out-patient. Under these circumstances, and the negligence of the defendant having been proved to their satisfaction, the jury found a verdict for the plaintiff, damages 150*l*. Nine days after the trial, and before judgment was signed, the child died. Judgment was afterwards signed by the next friend.

The 17 Car. 2, c. 8, s. 1, enacts that "in all actions personal, real, or mixed, the death of either party between the verdict and judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict."

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The 15 & 16 Vict. c. 76 (C. L. P. Act, 1852), s. 139, enacts that "the death of either party between the verdict and the judgment shall not hereafter be alleged for error so as such judgment be entered within two terms after such verdict."

A rule nisi was obtained (April 18) calling on the plaintiff to shew cause why, on payment by the defendant of the costs of the trial, and costs since incurred in this action, all further proceedings should not be stayed, or why the verdict for the plaintiff and the judgment signed thereon should not be set aside, and a new trial had, on the ground of the death of the plaintiff since the trial and before judgment signed.

May 1. *Murphy* shewed cause. First, judgment has been signed within the time specified by the 17 Car. 2, c. 8, s. 1, and the 15 & 16 Vict. c. 76, s. 139. Those enactments apply to all actions, whether the right of action survives to the representatives of the deceased or not; *Palmer v. Cohen* (1), which, however, conflicts with *Ireland v. Champneys*. (2)

[BRAMWELL, B. In any event we ought not to stay proceedings, for, if anything, this objection is ground of error.]

It cannot be alleged for error if judgment is signed, as in this case, within two terms after verdict. Secondly, the death of the plaintiff is no ground for a new trial. The damages might, perhaps, have been different had the jury assessed them with a belief that he would speedily die, but they cannot be called excessive.

[BRAMWELL, B. The jury gave damages on the assumption that the plaintiff would live and suffer.]

There is nothing to shew that they would in any event have given less. Moreover, damages at a trial are assessed once for all and cannot be affected by subsequent events.

M. Chambers, Q.C. (*Ribton* and *Beasley* with him), in support of the rule. The case is not within the statutes referred to. The next friend has no right to proceed, his authority, like that of an attorney, being determined by death: *Bac. Abr. Tit. Attorney* (E.); *Palmer v. Reiffenstein* (3); *Shoman v. Allen*. (4) In *Flinn v. Perkins* (5) it was held that a suggestion of the death of a plaintiff

(1) 2 B. & Ad. 966.

(2) 4 Taunt. 884.

(3) 1 Man. & G. 94.

(4) 1 Man. & G. 96 (n).

(5) 32 L. J. (Q.B.) 10.

could not be entered under s. 137 of the Common Law Procedure Act, 1852, except where the cause of action survived; and the same rule applies under s. 139 as to signing judgment. In neither section are there any words of limitation. Secondly, it would be unjust, the child having died, to make the defendant pay the damages awarded. The Court can prevent that injustice by granting a new trial: *Griffith v. Williams*. (1)

MARTIN, B. I am of opinion that this rule should be discharged. It was obtained on two grounds [the learned judge read the terms of the rule]. As to the first, we think that the proceedings are regular and should not be stayed. The question depends upon the Common Law Procedure Act, 1852, s. 139, and on the 17 Car. 2, c. 8, s. 1. The latter statute provides that "in all actions personal, real, or mixed, the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." In the former statute, there being but few real or mixed actions left, the same enactment is put generally. I am unable to account for the construction put upon the statute of Charles in *Ireland v. Champneys* (2); but in *Palmer v. Cohen* (3) the same point arose again, and the Court of Queen's Bench decided, as I think rightly, that the words of that statute are express and admit of no doubt. I therefore think that the proceedings here have been regular.

With regard to the second point, that the damages are excessive, I think upon the whole that we ought to let the matter rest, and not grant a new trial.

BRAMWELL, B. I am of the same opinion. As to the latter point, no doubt there is some hardship incurred; but we may remember this, that if the child had died before the commission

(1) 1 C. & J. 47.

(2) 4 Taunt. 884. By 8 & 9 Will. 3, c. 11, s. 6, it is enacted that actions are not to abate if the plaintiff or defendant happen to die after *interlocutory* and before final judgment, *if* such action might be originally prosecuted or maintained by or against the executors or administrators of the party dying. In *Ireland v. Champneys*, the action was for a

libel, and the plaintiff died *after interlocutory judgment* and writ of inquiry executed. It was held that final judgment could not be entered, the suit having abated by his death, and not being one which could have been brought by his representatives. See 2 Wms. Saund. pp. 72 n & 72 p.

(3) 2 B. & Ad. 966.

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day at Kingston, no damages would have been recoverable. If, on the other hand, it had outlived the first four days of this term, there could have been no such application as that now made to us. Under these circumstances, though we could interfere, I do not think we ought to do so. With regard to the first point, even assuming the defendant's contention to be right, he must bring error, for we could not stay proceedings in face of the case of *Palmer v. Cohen*. (1) But in fact the case under the Common Law Procedure Act, 1852, s. 139, is stronger against him than under the statute of Car. 2. Section 139 contains no such words of limitation as the surrounding sections [ss. 138, 140]. It would seem, therefore, to apply to all actions, whether they would have survived to an executor or not.

PIGOTT, B. I am of the same opinion. The words of s. 139 of the Common Law Procedure Act, 1852, are quite general, and include this case. I also think that this is not a case where we should grant a new trial.

Rule discharged.

Attorney for plaintiff: *W. T. Ricketts*.

Attorney for defendant: *T. Binns*.

 May 3.

 RAYMOND v. MINTON.

Apprentice—Independent Covenants—Condition Precedent.

To an action of covenant against the master for not teaching his apprentice, it is a good plea that the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him.

DECLARATION on a covenant by the defendant, contained in an indenture of apprenticeship of 18th Feb., 1864, by which the defendant covenanted to teach H. Page, the plaintiff's son-in-law, in the art, trade, or business of a builder, ornamental painter, and decorator, and to find him food, &c., during the five years of his apprenticeship, for a premium of 29*l.*, averring that the defendant did not nor would, during the term, or the part of it already elapsed, teach the apprentice in the said art, &c., but wholly failed, neglected, and refused so to do; and did not nor would find him food, &c.

(1) 2 B. & Ad. 966.

Third plea, as to the alleged breach in not teaching the apprentice, that at the time of the said alleged breach the apprentice would not be taught, and by his own wilful acts hindered and prevented the defendant teaching him in the said art, &c., and then, by his said acts, caused the breach pleaded to.

Demurrer and joinder.

Goddard, in support of the demurrer. The covenants in an apprenticeship deed are independent, and the non-performance of his duty by the apprentice may give a right of action to the master, but does not discharge him from the obligation to perform his own duty, *Winstone v. Linn* (1); on the contrary it is the master's duty to make the apprentice obey and learn, and he has the power by law to compel obedience: per Watson, B., in *Phillips v. Clift*. (2) The contract is one of a peculiarly personal kind, and of great mutual trust, and its difference from the ordinary one of master and servant is illustrated by the case last cited, where the dishonesty of the apprentice was held not to form any answer to an action against the master for not fulfilling his side of the contract. This plea may only mean that the apprentice is idle.

[MARTIN, B., referred to *Mercer v. Whall*. (3)]

If it is contended that the apprentice's obedience is a condition precedent to the master's performance of his duty, independently of the covenants in the deed, the covenant in the deed for his obedience becomes superfluous.

Grantham, in support of the plea, cited *Hughes v. Humphreys* (4), and pointed out that in both the cases relied on for the plaintiff, the action was brought for a total refusal to instruct the apprentice, which was not alleged here.

POLLOCK, C.B. It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught, and the plea sufficiently shews that to be the case.

MARTIN, B. The master contracts to teach the apprentice by the best means in his power, and common sense points out that, if the apprentice will not be taught, the master cannot teach him by

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(1) 1 B. & C. 460.

(2) 4 H. & N. 168; 28 L. J. (Ex.) 153.

(3) 5 Q. B. 447.

(4) 6 B. & C. 680.

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any means. The willingness of the apprentice to learn is naturally a condition precedent to the master's teaching him. Reduce the matter to a particular instance, and this becomes apparent. The master says to the apprentice, "Get up on that ladder and I will teach you the business of a house decorator;" the apprentice refuses, and stands upon the floor; it is obvious that the cause of the apprentice not being taught is that he has made it impossible, and the master cannot be called upon to perform an impossibility. (1)

BRAMWELL and PIGOTT, BB., concurred.

Judgment for the defendant.

Attorney for plaintiff: *R. S. Taylor.*

Attorney for defendant: *W. T. Ricketts.*

May 3

CAVELL AND ANOTHER v. PRINCE.

Covenant—Nullity of Marriage—Impotence.

To an action on a covenant made by the defendant in consideration of his daughter's marriage, the defendant pleaded that the marriage was null and void by reason of the impotence of the husband, without stating that it had been avoided by the sentence of any court, or that either of the parties had elected to treat it as void:—

Held, a bad plea.

DECLARATION on a covenant, by which the defendant covenanted with the plaintiffs to pay an annuity of 200*l.* to one I. if a marriage should be solemnized between him and the defendant's daughter, averring that the marriage was solemnized, and that 200*l.* was due on account of the annuity.

Fourth plea, on equitable grounds, that the deed was made with plaintiffs as trustees for I., in consideration of the marriage of I. with the defendant's daughter, and of such marriage being valid, and of I.'s being competent to contract the marriage, averring that in fact the marriage was not valid, and that I. was not competent to contract the same, but the marriage was always null and void by reason of the impotence of I., of which the defendant had

(1) Vide *Ellen v. Topp*; 6 Ex. 424; 20 L. J. (Ex.) 241.

no notice at the time of making the deed; and that the defendant's daughter had never been able to live and cohabit with I. by reason of his impotence, and had never lived and cohabited with him for the reason aforesaid, and the consideration for making the said deed wholly failed as aforesaid.

Demurrer and joinder.

The plaintiffs' points for argument on this demurrer were in substance as follows: That impotence existing in either party at the time of the solemnization of a marriage duly solemnized, is not a civil but a canonical disability to his or her entering into the marriage contract; that such disability renders such marriage voidable only, and not ipso facto void, and that such marriage can only be made void by the declaration of a sentence of nullity against it by the Court for Divorce and Matrimonial Causes, given during the life of both the parties. That, assuming a question of nullity of marriage to be cognizable in any court other than that for Divorce and Matrimonial Causes, the validity of a marriage duly solemnized cannot be questioned on the ground of the impotence of one of the parties thereto, by any person except the other party thereto. That the plea did not aver that the impotence of the man was permanent and incurable, nor that the woman was *virgo intacta et apta viro*.

Keane, Q.C. (*Haselfoot* with him), in support of the demurrer cited *Boehmerus. Princip. Juris. Canon. s. 346*, and *B——n v. B——n*. (1)

Beresford, in support of the plea, cited *H—— v. C——* (2), but admitted that the plea was destitute of authority.

The Court (POLLOCK, C.B., MARTIN, BRAMWELL, and PIGOTT, BB.) inclined to the opinion that such marriages were, in the words of Bramwell, B., in *H—— v. C——* (3), "valid at common law, unless avoided—null by the law ecclesiastical"; but they held that it was unnecessary to decide that point, for that whether, as between the parties to them, such marriages could or could not be treated as absolutely null and void, it was certainly not open to

(1) 1 Spinks, 248.

(2) 1 Sw. & Tr. 605; 29 L. J. (P. M. & A.) 81.

(3) 1 Sw. & Tr. 622; 29 L. J. (P. M. & A.) at p. 92.

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a third person to make the objection, when neither of the parties concerned had done any act to raise the question, or to signify an election to treat the contract as void.

Judgment for the plaintiffs.

Attorney for plaintiffs: *E. Cavell.*

Attorneys for defendant: *Lewis & Lewis.*

May 8.

COOMBES v. DIBBLE.

Contract—Illegality—Wager—Horse Race—Contribution to Prize—8 & 9 Vict. c. 109, s. 18.

The plaintiff and defendant agreed to ride a race each on his own horse, both the horses ridden to become the property of the winner:—

Held, that the horses could not be regarded as a contribution toward a prize within the meaning of the proviso in 8 & 9 Vict. c. 109, s. 18, and that the contract was therefore void under that section, as being “by way of gaming or wagering.”

DETINUE for the defendant’s horse.

Pleas, non-detinet and traverse of the plaintiff’s possession of the horse. Issues thereon.

At the trial before Byles, J., at the last Somersetshire Spring Assizes, it appeared that the plaintiff and the defendant agreed to ride a race, each on his own horse, the winner to become possessor of both horses. The race was accordingly run upon those terms, and won by the defendant. Shortly afterwards he took possession of the horse which had been ridden by the plaintiff. Upon these facts the learned judge directed a verdict for the defendant, leave being reserved to move to enter a verdict for the plaintiff for 14*l.*, upon the ground that the agreement was void, and that no property in the horse passed to the defendant under the agreement.

The 8 & 9 Vict. c. 109, s. 18, enacts that “all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won on any

wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, provided always that this enactment shall not be deemed to apply to any subscription, or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

A rule nisi was obtained (April 24) pursuant to leave reserved.

May 8. *Edlin* shewed cause. A horse race is a lawful game: *Evans v. Pratt* (1); and this agreement is therefore within the proviso of section 18, being, in effect, an agreement to contribute both horses towards a prize to be given to the winner of the race. It is not a contract, "by way of wagering," although it may be difficult to distinguish it from such a contract, there being only two contributors; but whether there are two subscribers or fifty is immaterial. *Batty v. Marriott* (2) is in point. There Cresswell, J., says (p. 832), that "a contribution to sweepstakes is clearly a wager, but by the proviso the prohibition or disqualification is not to apply to any subscription or contribution towards any plate or sum to be awarded to the winner of any lawful game."

[MARTIN, B. Except for the express words used by Cresswell, J., I should have thought the proviso would not have covered a contribution to sweepstakes.

POLLOCK, C.B. The statute speaks of a contribution for or toward a prize. I think that means a money contribution.]

There is nothing to prevent chattels which themselves form the prize from being contributed.

Prideaux, in support of the rule, was not called on.

POLLOCK, C.B. Upon the point which has been argued before us my opinion is clear. The question arises as follows:—Two men, each of them possessed of a horse, agreed to ride a race, each on his own horse, the winner to have both horses. That is the whole transaction; there is no deposit of anything with a stakeholder, but the owners simply agree together that they will ride the race, and that the successful rider shall keep both horses.

(1) 3 M. & G. 759.

(2) 5 C. B. 818; 17 L. J. (C.P.) 215.

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Now it has been contended on these facts, that there has been a contribution by each, or an agreement to contribute, for or toward a "plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise;" but I am of opinion that, unless a forced construction be adopted, no one could reasonably come to that conclusion. It is impossible to dissociate the view to be taken of an act of parliament from the essential circumstances connected with the subject matter of the act. Now I do not say that by no possibility could any one—affixing their ordinary meaning to the words—come to the conclusion contended for, but I should be much surprised if any one connected with the usages of horse racing should do so. Moreover such a construction confounds barter with sale. The act, I think, refers only to cases of actual money subscriptions. It may be, however, that if some *thing*, not money, were sent to a stakeholder, that would be a "subscription" within the meaning of the proviso. But to say that the two horses which run the race are a "contribution" toward the prize to be run for, is to extend the act to a case which I feel sure never was contemplated.

MARTIN, B. I am of opinion that this case falls within the first part of 8 & 9 Vict. c. 109, s. 18. The enactment is, that all contracts or agreements, whether by parol or in writing, "by way of gaming or wagering," shall be null and void. This is a contract, and I think a wager, in the ordinary sense of the word, that one horse should beat the other, to which was added a condition that the winner should have both horses. The section proceeds to enact that no suit shall be brought in any court of law or equity, to recover any sum of money or "valuable thing" alleged to be won in any wager, or which shall have been deposited in the hands of any person, to abide the event on which any wager shall have been made. Now a horse is "a valuable thing," and if it, or the sum of 14*l.*, had been in the hands of a stakeholder, I do not think it could have been recovered. Then comes the proviso, that the enactment is not to apply "to any subscription, or contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money," to be awarded to the winner of any lawful game. I think there was no subscription or contribution here. The horse of the loser was

to become the property of the winner, and that was a void contract. If the case came within the principles laid down in *Batty v. Marriott* (1), I should feel bound by that authority. But inasmuch as it does not fall under the terms of the proviso, it does not come within the decision in that case.

BRAMWELL, B. I am of the same opinion. It is clear that this case is within the first part of section 18. With regard to the proviso, I do not myself disagree with the decision in *Batty v. Marriott* (1); but this case is not within the proviso, and therefore not touched by that case. I do not say but that there may be a "prize" of such a thing as a horse, but in this case there was, in my opinion, no "contribution or subscription," nor any agreement to contribute or subscribe within the meaning of the proviso. The plaintiff was not to contribute his horse if he won, nor was the defendant if he won. I do not think the legislature could ever have meant to include such a case as this under the terms of the proviso. That being so, I must decide this question in the plaintiff's favour.

Rule absolute.

Attorneys for plaintiff: *Purkis & Perry.*

Attorney for defendant: *J. F. Holmes.*

In re WHITWORTH *v.* HULSE.

May 3.

Arbitration — Award — Insufficiency.

It is no objection to an award that the arbitrator has not found each matter referred to him separately, unless from the submission it is clear that the intention of the parties was that he should so find.

MOTION to set aside an award, or to refer it back to the arbitrator, on the ground that it did not sufficiently determine all the matters in difference, and did not settle the amount to be paid for certain shares.

Joseph Whitworth and William Wilson Hulse, formerly carried on business in partnership, and afterwards held shares in the Incorporated Company of Whitworth and Co. and the Manchester

(1) 5 C. B. 818; 17 L. J. (C.P.) 215.

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Ordnance and Rifle Company. Various differences arose between them, which had been once ineffectually referred to arbitration, and had also been the subject of a suit in Chancery.

Afterwards, by a memorandum of agreement, dated 15th of December, 1864, they agreed that all matters in difference between them should be referred to J. G. P. Child, and that his decision should be final and conclusive, and that a formal agreement should be prepared for that purpose.

Finally, by an agreement dated 3rd of January, 1865, after reciting the above facts, and the memorandum of agreement, and that on the execution of that memorandum it was understood between them that Hulse should retire from the incorporated company by the sale of his shares to Whitworth, and that Child should determine what sum Whitworth should, upon the balance of accounts between them, pay to Hulse for the transfer of the shares, and should finally decide and determine all matters in dispute between them; and that it had been since agreed that Hulse should assign to Whitworth, or as he might direct, all his interest in the patents, &c., in which he was jointly interested with Whitworth; and that mutual releases should be executed. It was agreed, amongst other things:—1. That the claims and demands of Hulse against Whitworth, in respect of the differences and matters aforesaid, and all matters in dispute between them, and the amount to be paid for the shares, should be, and the same were thereby, referred to the award of Child.

6. That in the event of either of the parties disputing the validity of the award, or moving the Court to set it aside, the Court should have power to remit the matters so referred, or any of them, to the reconsideration of the arbitrator.

7. That the agreement and submission might be made a rule of this Court at the request of either party.

8. That the arbitrator should direct Hulse to assign to Whitworth, or his nominees, his interest in the patents, &c., the joint property of Hulse and Whitworth; and that mutual releases should be executed of all claims and demands up to the date of the agreement.

- The arbitrator made his award, dated the 3rd of June, 1865, and awarded, First, that Whitworth should, on or before 1st of

June, 1866, pay to Hulse the sum of 22,978*l.*, in full satisfaction and discharge of all claims and demands of Hulse against Whitworth in respect of the differences and matters mentioned in the agreement, and of all other matters in dispute between them, including the amount to be paid by Whitworth to Hulse for the purchase of the shares in the incorporated company mentioned in the agreement. Secondly, that Hulse should assign his interest in the patents, &c., as provided in the agreement, and that mutual releases should be executed.

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The Solicitor General, for Whitworth, having obtained the above rule,

James, Q.C., Milward, Q.C., and Baylis, for Hulse, shewed cause, and on their refusing to consent to the matter being referred back to the arbitrator, the Court called on

The Solicitor General (*T. Jones* with him) to support the rule. The only complaint we make of the award is that it does not state what amount is to be paid on account of the shares. That is referred as a distinct matter, and ought therefore to be so found, *Randall v. Randall* (1), *In re Rider v. Fisher*. (2) Without knowing it, it will be impossible to prepare the deed of transfer of the shares, as the Stamp Act (13 & 14 Vict. c. 97, Table. Part 1, Conveyance) requires the consideration to be truly expressed in the instrument of conveyance. He also cited *Richards v. Browne*. (3)

MARTIN, B. This rule must be discharged. We ought not to set aside the award unless it is perfectly clear that it is improperly made, and open to an objection which could be raised in an action brought to enforce it. The Solicitor General says that he does not wish it set aside, but only sent back to the arbitrator that he may state the amount to be paid for the shares specifically. And if the other side acquiesced in this proposal it might be done; but they refuse, and are satisfied with it as it is. We have, therefore, to see whether it is a bad award, and I think that it is not. The cases cited were well decided, even according to the present improved practice in such matters. If several matters are referred to an arbitrator, he must decide them all; and again, if on the

(1) 7 East 81. (2) 3 Bing. N. C. 874. (3) 9 Irish Com. Law Rep. 199.

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true construction of the agreement he is to decide the matters referred separately, he must do so; for if this is the bargain of the parties it must be observed, otherwise the arbitrator does not follow the authority given to him. The question is, therefore, does the submission contain anything requiring the arbitrator to decide separately the matters referred to him? So far from that being said, the agreement rather says the contrary. The document of the 3rd of January, 1865, is the formal agreement of the parties, and after reciting that Child should determine what sum Whitworth should, *upon the balance of accounts* between them, pay to Hulse for the transfer of the shares, it refers to his arbitration all matters in dispute between them, and the amount to be paid for the shares. This conveys to my mind the idea that Child is authorized to settle all matters in dispute, and what is to be paid on the whole balance by Whitworth to Hulse. This award directs accordingly that Whitworth shall pay to Hulse 22,978*l.*, and in this the arbitrator appears to me to have exactly pursued his authority.

BRAMWELL, B. I also think the rule should be discharged. If the submission had made it necessary to find separately the sum to be paid for the shares, the award would be bad; and if the construction contended for by the Solicitor General were clear, we must set the award aside or refer it back. All I will say is that it is not clear, and therefore we cannot set it aside; and, as the other side refuse their consent, we cannot send it back. The rule must therefore be discharged, but the matter is one in which the other side should not be too ready to resort to the summary jurisdiction of the Court.

PIGOTT, B. The real question is, what is the true construction of the submission? I read it as my Brother Martin does, and I do not think that the parties intended that the amount to be paid for the shares should be found separately. If this had been their meaning, they would have said so in clear terms, whereas the result they appear to have required was the balance which on the whole account was to be paid to Hulse.

Rule discharged.

Attorney for Whitworth: *J. E. Fox.*

Attorneys for Hulse: *Gregory & Rowcliffes.*

HUBBARD *v.* LEES AND PURDEN.

Evidence—Pedigree—Family bible—Certificates—Power—Wills Act (1 Vict. c. 26), s. 10.

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May 3

The provision of the Wills' Act (1 Vict. c. 26), s. 10, making good the execution of powers by will, if executed as provided by the act with respect to wills, relates to powers created since, as well as to powers created before, the act.

Entries of pedigree in a family bible or testament, which is produced from the proper custody, are admissible as evidence, without proof of their handwriting or authorship.

Certificates of births, baptisms, marriages, or deaths, are admissible as evidence, without proof of the identity of the persons mentioned in them with the persons as to whom the fact recorded by them is sought to be established.

THIS was an action of ejectment, tried before Montague Smith, J., at the Stafford spring assizes, 1866. Purden alone appeared to the writ, and defended as landlord of Lees.

The land claimed was land taken on a partition in respect of a moiety which had descended to one Elizabeth Johnson, as co-heiress of her father. By a settlement made on her marriage with George Hewitt Lander, and dated 26th June, 1838, this moiety was conveyed by her to George Blest and his heirs, to the use (after the marriage) of her mother, Mary Johnson, for life, remainder over to various uses (including uses in favour of the husband and wife, and the issue of the marriage), remainder "after the decease of Susannah Smith (who had the last life estate), and in case the said Elizabeth Johnson shall survive the said S. Smith, to such uses, &c., as the said E. Johnson, notwithstanding her said intended coverture, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her legally executed, or *by her last will* and testament in writing, or any codicil thereto, to be by her signed and published in the presence of and attested by *three* or more credible witnesses, shall from time to time direct, limit or appoint, give or devise the same;" remainder to the use of E. Johnson, her heirs and assigns.

Elizabeth Lander (formerly Johnson) survived Susannah Smith, and by her will, dated 1st April, 1852, executed in conformity with the Wills Act, and attested by *two* witnesses only, she

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appointed her moiety to her husband in fee. She died without issue in 1852, and on 11th July, 1856, her husband died intestate as to this land, Mary Johnson, who had the first life estate in the property, surviving both of them. Mary Johnson died on 3rd August, 1856, all the uses previous to the power having failed in her lifetime.

About two years ago, Thomas Purden, the defendants father, claiming to be heir-at-law of George Hewitt Lander, brought ejectment against the tenants, who made no defence, and he accordingly obtained possession. He afterwards made a voluntary conveyance of the property to Thomas Purden, junior, the defendant.

The plaintiff, John Lander Hubbard, then commenced this action to recover possession of the land.

George Hewitt Lander, whose heir-at-law the plaintiff claimed to be, was great grandson of one Charles Lander, in the male line; the plaintiff was great grandson of one of Charles Lander's daughters, who had married James Moore. Amongst the children of Mrs. Moore, was, besides the plaintiff's grandfather, a daughter named Fanny, who afterwards became Mrs. Wells. Mrs. Wells had a testament, which she had received from her father, and which she gave a few years before her death to James Moore, her father's son by a former marriage; Maria Moore, the daughter of James Moore, received this testament from her father, and she produced it at the trial. It contained various entries of the family pedigree, written on the fly-leaf, which the witness proved were in the book when Mrs. Wells had it, and it was tendered as evidence of the facts so recorded. It was objected that there was no evidence of the authorship or handwriting of these entries.

A number of certificates of births, baptisms, marriages, and burials, were produced from parish registers, and were objected to, on the ground that there was no evidence of the identity of the persons named in them with the persons of the same name who occurred in the plaintiff's line of proof.

It was also objected that the power above mentioned, being created since the Wills Act, was not duly executed by a will attested by only two witnesses.

The learned Judge admitted the evidence, but reserved the point as to the execution of the power, (together with several other

points which it is unnecessary to mention), and a verdict was found for the plaintiff, with leave to the defendants to move to enter a non-suit, or a verdict for them on the points so reserved.

April 20. *Powell, Q.C.*, moved accordingly, and also for a new trial on the ground (amongst others) that the certificates were improperly admitted; and the Court in granting a rule upon the other points, refused it on the objection as to the certificates, saying, that the question of identity was entirely for the jury, and that they would not allow any doubt to be raised upon this point.

May 3. *Gray Q.C.*, and *Dowdeswell*, shewed cause. First, as to the entries in the testament, there is no authority for requiring any evidence as to authorship or handwriting. The ground of admitting in evidence entries made in bibles and testaments of the events of family history is, that they are treated as a quasi-record, and if the book is produced from the proper custody, they prove themselves. Secondly, as to the execution of the power, the words of the statute are distinct, (1 Vict. c. 26. s. 10), that "every will executed in manner herein before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." It is plain that this applies as well to powers created before as after the statute, and it is expressly so laid down by Lord Westbury in *Taylor v. Meads*. (1) The decision in that case went, however, upon a ground totally distinct from the present point, for it was there decided, affirming the case of *West v. Ray* (2), that a power to execute by deed or writing under seal was not within the section, and that the formalities required in its execution must therefore be strictly complied with; but this power is expressly given to be executed by will.

Powell, Q.C., and *H. Matthews*, shewed cause. The words "*shall have been expressly required*," shew that only wills executed before the statute are intended; and the reason is that before the statute, wills affecting real estate were required to be attested by three witnesses; when the act changed the law on this point it was

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(1) 34 L. J. (Ch.) 203.

(2) Kay 385; 23 L. J. (Ch.) 447.

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necessary to provide for powers to appoint by will, which in their creation had followed the formalities previously prescribed for wills, and which after the statute were likely to be executed by the donee according to the mode introduced by it; but there was no need to provide for powers created afterwards, and as to which it might be presumed that the donor would comply with the new order of things, unless he deliberately intended the contrary, in which case his direction must be followed. With respect to the testament, it is true that no positive authority can be produced in favour of the objection that evidence of authorship or handwriting must be given; but on the other hand all the cases are consistent with such evidence having been given in fact, and in its absence there is no security against the entries being merely fictitious.

MARTIN, B. This rule must be discharged. The first objection is that the testament produced was inadmissible in evidence. The book was produced by a witness who was niece of Fanny Wells, and to whose father Fanny Wells had given it. Fanny Wells was a granddaughter of the common ancestor, Charles Lander, and had received the book from her own father. It was therefore a family bible, and the witness was its proper custodian. This is all that is required to make it evidence; it is in the nature of a record, and being produced from the proper custody is itself evidence. To require evidence of the handwriting or authorship of the entries, is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been.

As to the objection to the exercise of the power, it is as clear as words can make it that s. 10 of the Wills Act applies as well to powers created since, as to powers created before, the statute, and there can be no doubt that this is what the legislature intended. In effect they say, we are aware that appointments are often required to be made by will in a mode different from that prescribed by the law as to wills in general, and that the courts hold it necessary that the power should be strictly pursued. This how-

ever, causes difficulty, and a frequent failure of execution; and as we now provide what we deem a sufficient protection to the execution of wills, it is expedient that we should further say, that any power to appoint by will shall be deemed duly executed, if the donee complies with these statutory formalities, no matter what additional security or solemnity the donor may have annexed to its exercise. This is good sense, and the intention of the parties is not substantially interfered with, when by the enactment of the new provisions the particular formalities required are laid aside. We have ascertained from my Brother Montague Smith that he had no doubt himself upon this point, nor upon any other of the points reserved, but that under the circumstances of the trial he thought it better to reserve them.

BRAMWELL, B., concurred.

Rule discharged.

Attorneys for plaintiff: *Shirreff & Son.*

Attorney for defendants: *E. Smith.*

DIXON *v.* BATY AND ANOTHER.

April 19.

Landlord and tenant—Ejectment—Possession—Evidence.

One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire, as against his landlord, a prescriptive title to the land first occupied by him.

ACTION of ejectment, tried before Mellor, J., at the Newcastle Spring Assizes, 1866.

The land claimed was a strip lying between a close of the plaintiff and the highway. The plaintiff proved at the trial that the close had been occupied in succession by William Elliott, the uncle of the defendants, by John Elliott, their father, and by the defendants themselves, since 1824, as tenants of the plaintiff and his predecessors in estate, and that, together with the close, they had occupied the land claimed. For the defendants it was proved by John Elliott, the father, who was 84 years old, that his father,

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Peter Elliott, formerly lived in a house on the other side of the road; and that whilst in occupation of this house, and before becoming tenant of any land owned by the plaintiff's predecessors in estate, he had for some time occupied a cartwright's shop, a garth, and a saw-pit, on the land claimed; that Peter Elliott, about seventy-one years ago, became tenant of the close afterwards held by William Elliott, John Elliott, and the defendants, at a rent of 1*l.*, but that no rent was paid by him for the shop, garth, and saw-pit. The rent of the close had been since raised to 3*l.* 9*s.*, and again, about thirty years ago, to 4*l.* 10*s.*; but one of the plaintiff's witnesses admitted, on cross-examination, that he paid 4*l.* rent for a neighbouring field smaller than the close occupied by the Elliotts. The fact that Peter Elliott occupied the land claimed before he occupied the plaintiff's close, was also sworn to by the sister of John Elliott, aged 81.

Upon this, Temple, Q.C., for the plaintiff, insisted that the presumption that the strip of land occupied by the Elliotts whilst tenants of the plaintiff and his predecessors, was occupied by them on behalf of their landlords, must prevail, unless they could shew a possession of twenty years before their tenancy commenced; but the learned judge ruled to the contrary, and directed the jury, that if they believed that before the Elliotts took the plaintiff's close they were dealing with the land claimed as owners, whether with a rightful or a wrongful title, the defendants were entitled to a verdict.

The jury found a verdict for the defendants, and, in answer to questions put to them by the learned judge, said they were satisfied that Peter Elliott occupied the land claimed as his own, before he became tenant of the plaintiff's close, and that the Elliotts never paid any rent in respect of it.

Temple, Q.C., (*G. Bruce*, with him) moved for a new trial on the ground of misdirection, raising the objection taken by him at the trial, and then overruled.

[*MARTIN, B.* The occupation by Peter Elliott, which was originally adverse to the plaintiff's predecessors, would continue so in the absence of some circumstance to prove the contrary.]

In the present case, the land claimed is land which by the ordi-

nary presumption of law would belong to the plaintiff, as owner of the close between which and the road it lies. Under such circumstances the continuance in possession of the land by Peter Elliott, who had acquired no prescriptive or other title to it, after he became tenant to the plaintiff's predecessors in estate, must be taken to have been by the consent of the landlord. Although he did not acquire possession of the land as tenant, he retained it as such.

[POLLOCK, C.B. Not unless he can be shewn to have paid rent, or otherwise acted as tenant in respect of it. He paid rent only for the close, and this is not sufficient to change the character of his possession of land which he already occupied as his own.]

Per Curiam (Pollock, C.B., Martin, Bramwell, and Pigott, BB.).

Rule refused.

Attorneys for plaintiff: *Pattison & Wigg.*

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TANNER v. EUROPEAN BANK, LIMITED.

BOWEN v. SAME.

May 3.

Interpleader—Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 12.

A. sued the defendants, to whom he had entrusted a policy for certain specified purposes, and declared in trover and detinue, and specially on the contract. B., who had pledged the policy with A., then brought an action against the same defendants for the recovery of the policy. An interpleader order was made, directing that the proceedings in the first action should be stayed till further order, that A. should be at liberty to defend the second action, indemnifying the defendants, and that B. should give the defendants security for costs:—

Held, that the order was rightly made.

Best v. Hayes (1) followed.

RULE obtained by *H. T. Cole* to set aside an interpleader order made in the above actions by Bramwell, B., on the 12th of January, 1866.

Bowen, having mortgaged to Tanner a ship called the *Duchess of Sutherland*, afterwards assigned to him a policy of insurance on that vessel and on another vessel called the *Alliance*. Losses having occurred in respect of both vessels, Tanner, who claimed under an agreement with Bowen the right to hold the money due on

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129.

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the insurance of the *Alliance*, to cover the money due on the mortgage, intrusted the policy to the defendants with directions to collect the money due on the *Alliance* only, and then to return it to him. They were unable to obtain payment of the insurance money, and whilst the policy was in their hands it was claimed by Bowen, or the inspectors of his estate, who denied the alleged agreement; they therefore refused to return the policy.

The first action was brought against the defendants by Tanner, and the declaration contained counts in trover and in detinue, and also a special count on the contract, laying as the breach that the defendants had refused either to collect the money or to deliver back the policy. The second action was brought by Bowen against the same defendants, after the commencement of the first action, to recover the policy from them.

Upon an interpleader summons taken out by the defendants before Bramwell, B., the learned judge made an order that all proceedings in the first action be stayed until further order; that Tanner be at liberty to defend the second action, giving the defendants an indemnity; and that Bowen give security for costs to the defendants. This was the order complained of.

T. Salter, for the defendants, shewed cause, and contended that the order was warranted by 1 & 2 Wm. 4, c. 58, and by section 12 of the Common Law Procedure Act, 1860.

H. T. Cole, for the plaintiff Tanner, in support of the rule. The Common Law Procedure Act, 1860, s. 12, gives no assistance; the difficulty is, not that the titles of the claimants are adverse, but that the defendants are under a special contractual obligation to Tanner. Tanner declares upon this contract, and the special count prevents any such order being made: for it is impossible that the rights involved in the contract between Tanner and the defendants can be settled in a trial between the defendants and another person who was no party to the contract.

[MARTIN, B., referred to *Best v. Hayes*. (1)]

The provision requiring Bowen to give security for costs is an insufficient protection, for in defending the second action Tanner will be put to extra costs, which will not be allowed on taxation;

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129.

and he will incur these costs in an action not of his own choosing, but which he will be compelled to adopt in order to defend his rights. He will also be prejudiced by the delay caused by the stay of proceedings.

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No counsel appeared for Bowen.

MARTIN, B. This rule must be discharged. We are authorized by the interpleader section of the Common Law Procedure Act 1860, (s. 12), and by 1 & 2 Wm. 4, c. 58, wherever an action has been commenced "in respect of a common law claim for the recovery of money or goods," to make such orders therein, "as to costs and all other matters as may appear to be just and reasonable." It is true that the judges, in construing the earlier statute, at first acted on the rule of not making an order unless the Court of Chancery would, under the like circumstances, have admitted an interpleader bill; but by degrees this rule was departed from, and in the case of *Best v. Hayes* (1) it was entirely disclaimed, and it was said that the Court had power to do what was just and reasonable without being so fettered. Now, I do not say whether, under the circumstances stated, I should have made the same order as my Brother Bramwell has made; but the order is just and reasonable, and unless we can see clearly that it does some wrong to one of the parties, we ought not to interfere.

BRAMWELL, B. I acted on the authority of *Best v. Hayes* (1), not without some misgivings as to its correctness, for I thought the argument on the other side was cogent—that the *jus tertii* ought not to be set up by one who has obtained from the plaintiff, by means of a contract, possession of the property sued for. But following that case, I endeavoured to put Tanner in the same position as if an action had been brought against him by Bowen. The second action will settle the right to the possession of the policy, and no injustice will be done by the order, in respect of Tanner's rights in the first action; for though a bailee, like a tenant, ought not to be permitted to deny the title of the person from whom he has received possession, yet, as the tenant who is evicted from the land may set up this eviction in answer to his landlord's action for rent, so, the bailee who is, as it were, evicted

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129.

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by the chattel being recovered from him in an action will, I imagine, be equally entitled to this defence against his bailor: it certainly *ought* to be so. Then, if Bowen can in the second action evict the defendants, which he can only do by shewing an absolute title to the policy, they have an answer to the plaintiff's claim of the policy in the first action. Therefore I think the order was in substance rightly made; it may be subject to revision in its details, and if Tanner wishes to go on with his action for the purpose only of recovering special damages on the contract, I should say that he might be allowed to do this, the right to the chattel being made to depend on the result of the other action. My recollection, however, of the matter is that this offer was made by me and refused. I will add that, if no title to the policy had been shewn in Bowen, I should not have made the order, but my impression was that a sufficient *primâ facie* title was made out to justify the defendants in asking for it.

PIGOTT, B. I am of the same opinion; and it appears to me that great pains has been taken by my Brother Bramwell to secure justice to the plaintiff. The complaint made on the plaintiff's behalf—that he may be subjected to unreasonable delay by reason of the stay of proceedings till further order—is groundless, for he will always be able, by application to a judge at chambers, to force Bowen on to trial; and as soon as that matter is settled (which it might have been long since, had the order been followed), he will be at liberty to proceed on the special contract. As to the argument that there was no jurisdiction to make the order, it is clear that, whether or not it is within the first Interpleader Act, it is within section 12 of the Common Law Procedure Act, 1860. The construction put upon the latter act by this Court in *Best v. Hayes* (1) I think correct; and I am glad the Courts have not consented to limit the power given them.

Rule discharged.

Attorney for plaintiff: *T. Baker, jun.*

Attorneys for defendants: *Taylor & Jaquet.*

(1) 1 H. & C. 718; 32 L. J. (Ex.) 129.

[IN THE EXCHEQUER CHAMBER.]

FLETCHER *v.* RYLANDS AND ANOTHER.

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*Trespass—Duty of owner of land—Negligence—Water.*May 14.

One, who for his own purposes brings upon his land, and collects and keeps there anything likely to do mischief if it escapes, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

The defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land; mines under the site of the reservoir, and under part of the intervening land, had been formerly worked, and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his own colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts, and flowed by the underground communication into the plaintiff's mines:—

Held, reversing the judgment of the Court of Exchequer, that the defendants were liable for the damage so caused.

ERROR from the judgment of the Court of Exchequer on a special case.

Declaration. First count, that the defendants were possessed of land in the township of Ainsworth, except the mines and veins of coal under the surface; and that the plaintiff was possessed of coal mines lying near the defendants' land; and that by reason thereof, and of a licence from the person in possession of certain underground cavities near the mines, he was entitled to use those cavities for the purpose of working the mines, and getting coals from the mines and carrying them through the cavities; yet the defendants so carelessly and negligently constructed on the said land a reservoir to contain water, and kept therein, in their possession and under their care, large quantities of water, and took so little and such bad care of the water that large quantities thereof, by reason of the premises, escaped from the reservoir and flowed towards and into the said mines and cavities, whereby the plaintiff was prevented for a long time from working the mines, and getting coal therefrom, and carrying the same through the

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cavities, and was put to expense in pumping out the water and repairing damage done by it, and lost gains and profits; and that such reasonable fear of being drowned in the mines and cavities was caused in the minds of workmen then and theretofore employed in the mines, and of others, that the working of the mines was rendered permanently more expensive and more difficult than it had been or would otherwise have continued to be.

Second count, that the plaintiff was possessed of coal mines, and that by reason thereof, and of a licence, &c. (repeating the allegations as to the cavities); and that the defendants were possessed of large quantities of water then by the defendants kept in a reservoir near to the mines and cavities; yet the defendants took so little and such bad care, &c. (repeating the allegations as to negligence and damage to the end of the first count).

Third count, that the plaintiff was possessed of mines and veins of coal in and under certain land, and the defendants were possessed of the said land above part of the said mines and veins; yet the defendants so negligently, carelessly, and improperly made and constructed a reservoir on the said land, and collected and dammed up thereon large quantities of water on the surface; that by reason of the premises large quantities of the said water flowed and forced their way through and out of the reservoir, towards, to, and into the mines and veins of coal of the plaintiff, whereby the mines and veins of coal were much damaged, and the plaintiff was prevented, &c. (repeating the allegations as to damage).

Plea, Not guilty. Issue thereon.

The action came on to be tried at the Liverpool summer assizes, 1862, and a verdict was entered for the plaintiff for 5000*l.*, subject to an award on the terms mentioned in an order of nisi prius, made 3rd of September, 1862. By a subsequent order of Channell, B., made 31st of December, 1864, the arbitrator was empowered, instead of making an award, to state a special case for the opinion of the Court of Exchequer, in such form as he should think fit, and it was ordered that the verdict should be subject to such special case, and that error might be brought on the judgment thereon, and on the judgment of the Exchequer Chamber, in the same manner as on a judgment on a special verdict.

The special case was argued in the Court of Exchequer in Trinity

Term, 1865, before Pollock, C.B., and Martin and Bramwell, BB., and judgment was given for the defendants by Pollock, C.B., and Martin, B. ; Bramwell, B., dissenting. (1)

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On this judgment the plaintiff brought error. The case stated as follows :—

The plaintiff had, since 1850, occupied a colliery in the township of Ainsworth, called the Red House Colliery, as tenant to the Earl of Wilton.

The defendants owned a mill, called the Ainsworth] Mill, lying to the west of the Red House Colliery.

In 1860, the defendants, in pursuance of an arrangement with Lord Wilton, made a reservoir for their mill in other land of Lord Wilton's lying to the north-west of the colliery, and separated from it, and from the mill, by lands belonging to two persons named Hulton and Whitehead. Whitehead's land lay to the north of and adjoining the land over the Red House Colliery ; on the west it adjoined Hulton's land ; and on all other sides was surrounded by Lord Wilton's land. Hulton's land lay to the west of and adjoining Whitehead's land ; on the north it adjoined the land of Lord Wilton, in which the reservoir was constructed, and on the south it adjoined the Red House Colliery and the defendants' mill, the mill being to the west of the colliery.

The seams of coal belonging to the Red House Colliery are continued under the lands of Hulton and Whitehead, and under the lands in which the reservoir was made, and their dip is downwards from north-east to south-west. The coal under the site of the reservoir, and under Lord Wilton's land lying between that site and Hulton's land, as well as under the lands of Hulton and Whitehead, had at some time beyond living memory been partially worked ; and, before the commencement of the plaintiff's workings at the Red House Colliery, the old coal workings under the site of the reservoir communicated with old coal workings under Whitehead's land by means of the intervening old coal workings under the land of Hulton and under the land of Lord Wilton lying to the north of Hulton's land.

Soon after the plaintiff commenced to work the Red House

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Colliery in 1850 he made arrangements with Whitehead to work the ungotten coal lying under Whitehead's land by means of the Red House pit ; and in 1851 he accordingly worked through from the Red House Colliery into the coal under Whitehead's land, and so into the old workings there. This was done in the first instance without the knowledge of Lord Wilton ; but afterwards, and whilst the plaintiff was working this coal by the Red House pit, the fact became known to the earl's agents, and from that time the plaintiff so worked it without any objection on the part of the earl or his agents.

In consequence of these workings, the old coal workings under the site of the reservoir were, by means of the intervening underground workings, made to communicate with the plaintiff's coal workings in the Red House Colliery ; so that water which found its way into the old workings under the reservoir would, by means of this communication, flow down to and into the Red House Colliery.

These underground communications were effected several years before the defendants commenced making their reservoir, and continued down to the time when it burst ; but until that time their existence was not known to the defendants, nor to any agent of theirs, nor to any other person employed by them ; neither was it till that time known to them, or to any of the persons employed by them in or about the selecting of the site, or the planning or constructing of the reservoir, that any coal had been worked under the reservoir, or under any of the land of Lord Wilton lying to the north of Hulton's land.

In the course of constructing and excavating for the bed of the reservoir, five old shafts, running vertically downwards, were met with in the portion of land selected for its site ; but though the timber sides of three of them remained, the shafts themselves were filled up with soil ; and it was not known to or suspected by the defendants, or any of the persons employed by them in making the reservoir, that they led down to old coal workings under its site.

For the selection of the site, and for the planning and construction of the reservoir, it was necessary that the defendants should employ an engineer and contractors ; and they did for those purposes employ a competent engineer and competent contrac-

tors, by whom the site was selected, and the reservoir planned and constructed. On the part of the defendants themselves there was no personal negligence or default whatever; but, with reference to the shafts met with, reasonable and proper care and skill were not exercised by the persons they employed, to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear.

The reservoir was completed about the beginning of December, 1860, and the defendants caused it to be partially filled with water. On the morning of the 11th December, whilst it was thus partially filled, one of the shafts gave way and burst downwards, and the water flowed into the old coal workings beneath, and by means of the underground communications found its way into the coal workings in the Red House Colliery, and flooded the colliery, so that its working was necessarily suspended, and after some unsuccessful attempts to renew it, the colliery was finally abandoned.

The question stated for the opinion of the Court was, whether the plaintiff was entitled to recover any, and, if any, what damages from the defendants, by reason of the matters hereinbefore stated. (1)

Feb. 8. *Manisty, Q.C. (J. A. Russell with him)*, for the plaintiff. First, omitting the consideration that the defendants became tenants of Lord Wilton, the plaintiff's landlord, subsequently to the demise to the plaintiff, and to the making of the works connecting the underground passages, and dealing with the matter as if they were mere strangers, the plaintiff is entitled to recover damages. The principle of law which governs the case is, that he who does upon his own land acts which, though lawful in themselves, may become sources of mischief to his neighbours, is bound to prevent the mischief from occurring, or in the alternative to make compensation to the persons injured. This will be peculiarly the case when the act done consists in the construction and use of artificial works, for the purpose of collecting and impounding in vast quantities an element which will certainly cause mischief if

(1) The case contained various statements for the purpose of shewing the damage suffered by the plaintiff; but as there was no argument or decision

as to the amount of damages, those statements are omitted. See note at end of case.

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it escapes. The case does not resemble that of a servient and a dominant tenement with acquired rights, as seems to have been thought by Martin, B., in his comment upon *Tenant v. Goldwin* (), and the duty is independent of the immediate neighbourhood of the lands. Neither is the circumstance material which is relied on by the Chief Baron, that the communication by which the water passed was underground and unseen; for the plaintiff's right of action is founded on his absolute right to enjoy his property undisturbed by the acts of his neighbours, and is independent of the amount of care exercised by them, or of their means of knowledge. This is the effect of *Lambert v. Bessy* (2), and the opinions there pronounced.

[BLACKBURN, J. In the cases put there the things done were all *primâ facie* wrong, but the difficulty here is in saying that what was rightful in the first doing, became wrongful in the continuance. The other side will contend that their duty was to take care, but not to take successful care.]

The duty is the same as that of rendering support to neighbouring land, from which the landowner is not excused by his ignorance of the state of adjoining land which may contribute to the injury, or of the position of the strata which he cannot know; he is absolutely bound not to injure his neighbour by the withdrawal of support: *Bonomi v. Backhouse*. (3) Similarly the mine-owner who works to the edge of his land subjects himself to the natural flow of water into his mine, but not to the flow of water artificially brought there by a neighbouring mine-owner; these two propositions are established by the cases of *Smith v. Kenrick* (4) and *Baird v. Williamson*. (5) The case of *Hodgkinson v. Ennor* (6) is an authority for the plaintiff, resembling the present case in the fact that the communication by which the defendant's dirty water flowed to the plaintiff's premises was underground.

[BLACKBURN, J., referred to the case of damage done by the bursting of waterworks companies' reservoirs.]

(1) 2 Ld. Raym. 1089; 1 Salk. 21, 360.

(2) Sir T. Raym. 421.

(3) 9 H. L. C. 503; E. B. & E. 622,
659; 27 L. J. (Q. B.) 378; 28 L. J. (Q. B.)
378; 34 L. J. (Q. B.) 181.

(4) 7 C. B. 515.

(5) 15 C. B. (N. S.) 376; 33 L. J.
(C. P.) 101.(6) 4 B. & S. 229; 32 L. J. (Q. B.)
231.

Such cases usually arise under a clause in the special act of the company, imposing on them a liability to make compensation. The case, however, of *Bagnall v. London & North Western Railway Company* (1), though not so simple in its circumstances as the present, is in principle indistinguishable.

[BLACKBURN, J. The point in that case was, that however the water got upon the line, the company were bound by their act to have their drains in order to carry it off, and that their drains were not in order.

WILLES, J. That was certainly the ground of the judgment of this Court.]

The principle contended for is laid down in *Aldred's* case (2); and in *Williams v. Groucott* (3) by Blackburn, J., who says, "when a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights;" and by Gibbs, C. J., in *Sutton v. Clarke* (4), who, distinguishing the case then before him, says: "This case is perfectly unlike that of an individual, who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour; if he thereby unwittingly injure his neighbour, he is answerable." The question as to the purity or impurity of the water discharged is immaterial, the same principle applies to both cases.

[BLACKBURN, J. It is a different sort of mischief, but it is equally a mischief.]

Chauntler v. Robinson (5) is no authority against the plaintiff; for it decides nothing but that the owner of a house is not obliged to repair merely because he is owner. The case, however, mostly relied upon on the other side is *Chadwick v. Trower* (6); the plaintiff there was held to have no right to support for his vault from the vault of his neighbour, who was ignorant of the existence of the plaintiff's vault, and the judgment proceeded on the ground

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(1) 7 H & N. 423, 452; 31 L. J. (Ex.)
121, 480.

(Q.B.) 237.

(2) 9 Rep. 57 b.

(4) 6 Taunt. at p. 44.

(3) 4 B. & S. at p. 157; 32 L. J.

(5) 4 Exch. 163—170.

(6) 6 Bing. N.C. 1.

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of the absence of right to such support, and on the fact that no circumstances existed imposing on the defendant the duty of care.

[LUSH, J. In fact the plaintiff there sought to impose a servitude on the defendants' premises.]

Secondly, the plaintiff was tenant of Lord Wilton, and the communication was effected by workings made with the landlord's consent nine years before the defendants became tenants of the site of the reservoir; the defendants could only take their land subject to the obligation which was imposed upon the landlord by this state of facts.

Thirdly, the defendants were liable for the negligence of the persons who made the reservoir; for, first, they could not discharge themselves of their duty of care by employing them, and secondly, the knowledge of those persons of the existence of the shafts was notice to the defendants both of the facts and of the danger.

Mellish, Q.C. (*T. Jones* with him), for the defendants. The question is a novel one, but authority and reason are in favour of the defendants. It is true the defendants have altered the condition of their land, but on the other hand, if the plaintiff had left the intervening land in its natural state, no mischief would have ensued. The mischief was caused by secret acts done partly by strangers, partly by the plaintiff himself, which have broken down the natural partition of the lands, and opened the channels by which the water has come, and it will be strange if those secret acts, not communicated to the defendants, should impose on them a liability. But on broad principles, there is no such obligation as is contended for on the other side. The only obligation on the defendants is to take care, that is, *reasonable care*, not to injure the property of others; and to establish their liability in this action, it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbour's property from anything done upon his own land. It is clear that there is no such obligation with respect to personal property. The right, not to have "foreign water" sent upon one's land, is not a greater or more important right than the right not to have one's person injured, but in the latter case no right of action arises unless the damage is caused by the direct act of the defendant himself, or by his negligence. The same rule applies

to real property, and though the cases are fewer they are to this effect. The instances in which the owner of real property has been held liable may be classified thus: first, acts of trespass; second, acts purposely done, and which are calculated to cause the injury complained of, as in *Aldred's* case (1); third, cases where, by reason of the natural relation of the properties, a legal relation has been constituted between them; as in the case of the right to support, or the right to a watercourse, which are natural easements, and as to which the plaintiff need not allege any special title in himself, nor any negligence in the defendant. Here no right of this latter class is involved, but the right is the same as the right of any subject not to be injured by any other subject; and the fallacy in the judgment of Bramwell, B., in the court below is, in assuming that there is any such right as "to be free from foreign water," or "not to have water turned in upon one." There is no such right distinct from the general right of ownership in the soil, and the case stands on the same footing as if the owner had himself been drowned at the bottom of the mine. The second class of cases is illustrated by *Hodgkinson v. Ennor* (2), for it was there found as a fact that the defendant knew that the channel down which he poured the dirty water would carry it to the plaintiff's premises; he threw it into the swallet meaning that it should be carried away, and it might perhaps be admitted that, having done this intentionally, he would be liable whether he knew where it would go to or not; but the defendants here have tried to keep the water in, but by its own weight it has forced its way through.

[LUSH, J. Suppose the bank of the reservoir had burst, and the water had flowed over the surface and down the pit's mouth.]

The distinction between the surface and underground passages is only material as a circumstance of negligence; with reference to the surface, the facts are known which give rise to the obligation to take care, but the ignorance of the state of things underground takes away the opportunity of exercising care, and therefore the duty to exercise it. It is for this purpose only that the defendants rely on the case of *Chadwick v. Trower* (3); sup-

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(1) 9 Rep. 57 b.

(2) 4 B. & S. 229; 32 L. J. (Q.B.) 231.

(3) 6 Bing. N.C. 1.

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posing it made out that there is no liability except where there is carelessness, that case shews that there can be no carelessness where there is no knowledge, nor any circumstances giving the means of obtaining knowledge, with a duty to know; and there is no case where a defendant has been held liable without such knowledge or notice. That being so, it is immaterial whether or not the duty to take care means a duty to insure against all consequences, for the occasion of that duty has never arisen.

[BLACKBURN, J. The present point may be illustrated thus: suppose a man leans against my cart, if I remove the cart suddenly, and without warning, not knowing he is there, I am not liable, but if I do so knowing that he is there, though he has no right to lean against my cart, yet I am liable if my act injures him.

WILLES, J. Take the case of a continuous nuisance, I mean continuous in its own character; the person who erects it is liable at once, the person who succeeds to it is not liable unless he has notice and continues it, but it is said that as soon as he has notice of it he must abate. Suppose a man to collect a quantity of springs in such a manner as to cause them to pour down his neighbour's mine. Assuming that the person who succeeded to the possession of the land where the springs were so collected would not be liable until notice, yet you would admit that upon receiving notice he would be liable for continuing it. Then is there any case where the same doctrine has been held to apply to the originator of the nuisance?]

It is submitted that the liability would turn on the defendants' knowledge, and that in each case knowledge is the essential condition of liability. In the absence of any authority distinguishing liability in respect of injury to real property from liability in respect of other injuries, the doctrine laid down as to actions of the latter kind applies, and in these it is clear that negligence must be shewn. This is illustrated by the case of *Scott v. London Dock Company* (1), where it was never doubted that negligence must be alleged and proved, and the only question was, whether the fact, that the bale which fell was under the management of the defendants' servants, was sufficient *primâ facie* evidence of negligence. A common instance is that of collisions of ships at sea, or accidents caused by driving or

(1) 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.

riding along the highway, as *Hammack v. White* (1), in all which cases without negligence there is no liability.

[LUSH, J. Suppose the case of a gunpowder magazine bursting, what liability do you say its owners would incur?]

None, if there was no negligence as to the place where the powder was kept, or in the manner of keeping it. The liability as to fire, formerly an absolute duty to insure against all mischief caused to your neighbours by fire arising on your own property, is said to have been by the custom of the realm: *Turbervil v. Stamp* (2); Com. Dig., Action on the case for negligence (A 6); and since the passing of 14 Geo. 3, c. 78, and the decision upon s. 86 of that act in *Filliter v. Phippard* (3), the liability for injury by fire is restricted to mischief arising from negligence, that is, it is put on the same footing as liability for other injuries. The sum of the argument is, that to make the defendant liable a wrongful act must be shewn, and that to prove the act wrongful you must prove it negligent.

[WILLES, J., referred to *Gregory v. Piper*. (4)]

That was a case of trespass, to which this cannot be compared, nor is there any count in trespass here. In *Gregory v. Piper* (4), it was proved to be impossible that the act of the defendant's servant could be done as the defendant directed without committing a trespass; the act, therefore, became the direct act of the defendant, and that was the ground of the judgment. The distinction is between acts done directly by the defendant, which include all acts which are specifically directed by him, although not done by him physically or in his presence, and things which are only the consequences of what he does or directs to be done; it is in respect of these last that negligence is material.

[BLACKBURN, J., referred to *Tenant v. Goldwin*. (5)]

That case is open to the same observation; the mischief was the inevitable consequence of the combined facts that the defendant put the filth there, and that he did not repair the wall, which was his own wall. The case may indeed be put as a case of negligence,

(1) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

(2) 1 Salk. 13.

(3) 11 Q. B. 347.

(4) 9 B & C. 591.

(5) 2 Ld. Raym. 1089; 1 Salk. 21, 360; 6 Mod. 311; Holt 500.

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the negligence consisting in taking no care to prevent the filth from flowing into his neighbour's premises.

With respect to the cases cited upon the other side, they are all distinguishable. *Bonomi v. Backhouse* (1) belongs to the third class of cases mentioned above, and depended on the right arising by reason of the contiguity of the lands. *Lambert v. Bessy* (2) was a case of trespass. *Baird v. Williamson* (3) was a case in which the defendant purposely caused the water to flow into the adjoining mine; no right is contended for here to use the plaintiff's land as an outlet. On the other hand, the language used in *Smith v. Kenrick* (4) supports the defendants' contention, "it would seem to be the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." *Aldred's* case (5) was also an instance of an act purposely done, and calculated to cause a nuisance: *Bagnall v. London & North Western Railway Company* (6) turned upon the obligation imposed upon the company by their act. As to the dictum of Gibbs, C.J., in *Sutton v. Clarke* (7), it was pronounced obiter, the decision in the case being in favour of the defendants on the ground that they were public trustees.

Secondly, the defendant is not liable for the negligence of the contractors employed by him. It was laid down in *Butler v. Hunter* (8), that when one gives an order to a skilled person to do a particular thing, he must be taken to mean that it shall be done with the proper precautions. The negligence of the contractor was negligence towards his employer as well as towards third persons, and he, as the wrong doer, is liable to actions by both parties, who have been both in different ways injured by his carelessness; but the plaintiff having a right of action against him,

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| (1) 9 H. L. C. 503; 34 L. J. (Q.B.) 181. | (5) 9 Rep. 57 b. |
| (2) Sir T. Rayn. 421. | (6) 7 H & N. 423; 31 L. J. (Ex.) 121, 480. |
| (3) 15 C. B. (N.S.) 376; 33 L. J. (C.P.) 101. | (7) 6 Taunt. at p. 44. |
| (4) 7 C. B. at p. 564. | (8) 7 H & N. 826; 31 L.J. (Ex.) 214. |

there is a presumption against the liability of the defendants, for the plaintiff would then have a double remedy.

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[WILLES, J., referred to *Pickard v. Smith*. (1)]

Manisty, Q.C., in reply. It seems to be admitted that if a trespass has been committed the defendants are liable; and here the collecting of the water in such a manner as to invade the premises of the plaintiff was a trespass; as there would have been a trespass in *Bonomi v. Backhouse* (2) if the consequence of the withdrawal of support had been to let down a house upon the plaintiff's land; and as the flow of the filth is actually described to be in *Tenant v. Goldwin*. (3) He also referred to the case of *Barber v. Nottingham & Grantham Railway Company* (4) handed to him by McMahon.

[*Mellish, Q.C.* That case turned on the language of the defendants' special act; I argued the case, and the Court refused to give any answer to my question, whether at common law an action would lie.]

Cur. adv. vult.

May 14. The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.), was delivered by

BLACKBURN J. This was a special case stated by an arbitrator, under an order of nisi prius, in which the question for the Court is stated to be, whether the plaintiff is entitled to recover any, and,

(1) 10 C. B. (N.S.) 470. The defendant occupied a refreshment-room and coal cellar at a railway station, the trap of the coal cellar being in the platform of the station. The plaintiff, a passenger by the railway, as he was going along the platform, fell down the opening whilst the trap-door was raised for the purpose of the coal merchant discharging coal into the cellar, and was under the coal merchant's control. It was held that the defendant was liable as the occupier of the cellar; and in delivering the judgment of the Court, Williams, J., after referring to the rule which exempts the employer from liability for the negligence of an independent

contractor employed by him to do a lawful act, says (p. 480): "The rule, however, is not applicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent on his employer, and neglects its fulfilment, whereby an injury is occasioned."

(2) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

(3) 2 Ld. Raym. 1089; 1 Salk. 21, 360.

(4) 15 C. B. (N.S.) 726; 33 L. J. (C.P.) 193.

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if any, what damages from the defendants, by reason of the matters thereinbefore stated.

In the Court of Exchequer, the Chief Baron and Martin, B., were of opinion that the plaintiff was not entitled to recover at all, Bramwell, B., being of a different opinion. The judgment in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the court. The only question argued before us was, whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of Bramwell, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants, by reason of the matters stated in the case, and consequently, that the judgment below should be reversed, but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case [see pp. 267-8], that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears, [see pp. 268-9] that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill was not used by the persons employed by them, to provide for the sufficiency of the

reservoir with reference to these shafts. The consequence was, that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

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The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are reponsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to

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the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book, 20 Ed. 4. 11. placitum 10, Brian C.J., lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant v. Goldwin* (1), which will be referred to afterwards. It was trespass with cattle. Plea, that

(1) 2 Ld. Raym. 1089; 1 Salk. 360.

the defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C.J., says: "It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other." He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox v. Burbidge* (1), Williams, J., says, "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May v. Burdett* (2), the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that, "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*." And in 1 Hale's Pleas of the Crown 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt, for *though he use his diligence* to keep him up, if he escape and do harm, the owner is liable to answer damages;" though, as he proceeds to shew, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the

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(1) 13 C. B. (N.S.), at p. 438; 32 L. J. (C.P.) 89. (2) 9 Q. B. at p. 112.

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natural consequence of the escape, the rule as to keeping in the animal is the same. In Com. Dig. Droit. (M.2.) it is said that, "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose *at his peril*, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres *at his peril*." The authority cited is Dyer, 372 b., where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle *at his peril*, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to Fitzherbert Nat. Brevium, 128, which is attributed to Lord Hale, it is said, "If A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively, Dyer 372, Rastal Ent. 621, 20 Ed. 4. 10, although wild dogs, &c., drive the cattle of the one into the lands of the other." No case is known to us on which in replevin it has ever been attempted to plead in bar to an avowry for distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff, and surely if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does in *Cox v. Burbidge* (1), that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour, and the case of *Tenant v. Goldwin* (2), is an express authority that the duty is the same, and is, to keep them in at his peril.

As Martin, B., in his judgment below appears not to have

(1) 13 C. B. (N.S.) at p. 438; 32 (2) 1 Salk. 21, 360; 2 Ld. Raym
L. J. (C.P.) 89. 1089; 6 Mod. 311.

understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. p. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (solebat) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (*jure debuit reparari*).” Yet he did not repair it, and for want of repair filth flowed into plaintiff’s cellar. The case is reported by Salkeld, who argued it, in 6 Mod., and by Lord Raymond, whose report is the fullest. The objection taken was that there was nothing to shew that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the wall *de jure debuit reparari* by the defendant being an inference of law which did not arise from the facts alleged. Salkeld argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argument, intimated an opinion against him on that, but that after consideration the Court gave judgment for him on the second ground. In the report of 6 Mod. (1) it is stated, “And at another day per totam curiam: The declaration is good; for there is a sufficient cause of action appearing in it; *but not upon the word solebat*. If the defendant has a house of office inclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is

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bound to keep his cattle from running into the vendor's piece; so of dung or anything else." There is here an evident allusion to the same case in *Dyer* (1) as is referred to in *Com. Dig. Droit. (M.2)*. Lord Raymond in his report (2) says: "The last day of term, Holt, C.J., delivered the opinion of the Court, that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; *that they did not go upon the solebat, or the jure debuit reparari*, as if it were enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is because every man must so use his own as not to damnify another." Salkeld, who had been counsel in the case, reports the judgment much more concisely (3), but to the same effect; he says: "The reason he gave for his judgment was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's, . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord Holt corresponds with that of Brian, C.J., in the cases already cited in 20 Ed. 4. Martin, B., in the Court below says

(1) See ante, p. 282. (2) 2 Ld. Raym. at p. 1092. (3) 1 Salk. 361.

that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will shew that it was because Lord Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was *not* admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril prevent it from getting on his neighbour's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shewn; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the

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noisome vapours to arise on his premises, and suffered them to come on the plaintiff's, without stating there was any want of care or skill in the defendant, and that the case of *Tenant v. Goldwin* (1) shewed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief. What is said by Gibbs, C.J., in *Sutton v. Clarke* (2), though not necessary for the decision of the case, shews that that very learned judge took the same view of the law that was taken by Lord Holt. But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: *Hammack v. White* (3); or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, *Scott v. London Dock Company* (4); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of

(1) 1 Salk. 21, 360; 2 Ld. Raym. (C.P.) 129.

1089; 6 Mod. 311.

(4) 3 H. & C. 596; 34 L. J. (Ex.)

(2) 6 Taunt. at p. 44.

17, 220.

(3) 11 C. B. (N.S.) 588; 31 L. J.

care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *primâ facie* was a trespass, can be explained on the same principle, viz., that the circumstances were such as to shew that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case [pp. 268—9].

We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle, the case may be mentioned again. (1)

Judgment for the plaintiff.

Attorneys for plaintiff: *Clarke, Woodcock & Ryland.*

Attorneys for defendants: *Milne & Co.*

(1) On a subsequent day (June 18), *Manisty, Q.C.*, stated to the Court that the damages had been agreed at 937*l.*

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END OF EASTER TERM.

CASES
DETERMINED BY THE
COURT OF EXCHEQUER
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,
BEFORE AND AFTER
TRINITY TERM, XXIX VICTORIA.

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May 25.

IN THE MATTER OF EARL COWLEY'S SUCCESSION.

Succession duty—Expenses of management incurred by trustees—Necessary outgoings—Annual value—16 & 17 Vict. c. 51, ss. 21, 22.

In estimating the value of a succession to lands the legal estate in which is vested by will in trustees, the cestui que trust is not entitled to deduct as "necessary outgoings" reasonable expenses of management incurred, independently of his control, by the trustees acting under an authority given to them by the will.

In re Elwes (1) followed.

THIS was a petition, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 50, against an assessment made by the Inland Revenue Commissioners on the petitioner, in respect of a succession accruing to him under the will of the Earl of Mornington. The circumstances of the case were as follows:—

By a will, dated 27th June, 1863, Lord Mornington, after bequeathing certain legacies and annuities as therein mentioned, which were directed to be paid out of the income of the testator's general

(1) 3 H. & N. 719.

residuary estate, and after disposing of his personal estate as therein mentioned, devised the whole of his real estate to W. B. Glasse and A. A. Collyer-Bristow, their heirs and assigns, upon trust, to pay the interest of several mortgages, to keep up his mansion house, to pay fire insurance, and to pay such parts of the annuities before mentioned as the residuary estate might be insufficient to meet; and subject and charged as aforesaid upon trust for Earl Cowley for life, with remainders over. The will directed the trustees, during the continuance of the mortgage debts, and of a certain annuity specified, to continue in possession or receipt of the rents and profits of the premises, to manage them, and generally to deal with them as if they, the trustees, were the absolute owners thereof. Authority was also given to them to appoint stewards, agents, receivers, surveyors, bailiffs, and others, for the general letting and management of the premises, subject to the trusts of the will, and the collecting the rents and profits thereof, and out of the rents and profits to pay to the persons so employed such reasonable allowances as to the trustees should seem fit.

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The testator died in July, 1863, leaving his real estate subject to the payment of mortgage debts to a considerable amount, and to the payment of the annuities mentioned. Since his death, the mortgage debts being still unsatisfied, and the specified annuity still subsisting, the trustees have managed the estate, and necessarily employed resident agents, superintendents, and receivers, to whom reasonable remuneration has been paid. In his return of the succession accruing to him under Lord Mornington's will the petitioner claimed to deduct under the provisions of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 22, as "necessary outgoings," the sum of 1100*l.*, being the amount of the salaries paid to the agents and the percentage paid to the receivers by the trustees, but the commissioners refused to make the allowance claimed, and made their assessment, excluding the mortgages and annuities only. The petitioner thereupon brought this appeal.

The 16 & 17 Vict. c. 51, s. 21, defines the interest of every successor in real property to be "of the value of an annuity equal to the annual value of such property after making such allowances as are hereinafter directed." Section 22 enacts that "in estimating the

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<i>Re</i>	and other property yielding or capable of yielding income not of a
EARL COWLEY.	fluctuating character, an allowance shall be made for all <i>necessary outgoings</i> ."

Bovill, Q.C., and *Hannen*, for the petitioner. The Succession Duty Act is, according to its title, "for granting duties on successions," and s. 2 defines a successor to be a person "beneficially entitled." Now, Lord Cowley is not beneficially entitled to the amounts expended by the trustees in management, any more than to the sums paid by way of interest on the mortgages and by way of annuity. Section 20 enacts that the duties are to become payable on the successor coming into possession, but Lord Cowley comes into possession of nothing but the surplus after the expenses and charges are paid. Possibly there might be no surplus, and can it be considered that if there were none, he would still be liable to pay duty on these expenses over which he has no control whatever? Again, ss. 21, 22 prescribe the mode of ascertaining the annual value of a succession, and allowances are directed to be made in respect of "necessary outgoings." These expenses are "necessary" as far as Lord Cowley is concerned, because he has not, and could not have any control over them. In *In re Elwes* (1) similar charges were not allowed, but in that case the successor, though a minor absent from England, was in possession, and might, had he pleased, have controlled the expenses incurred. In the present case, Lord Cowley is entitled to succeed only to what remains after the charges are paid, and after the trustees of the estate have spent what they please on management, possibly much more than he would have spent himself. The latter item of expenditure is as much a "charge" as the mortgages or annuities, and ought to be deducted in the same manner.

The Attorney General, for the Crown. In *re Elwes* (1) is a direct authority in favour of the Crown. There precisely similar expenses were not allowed as "necessary outgoings." The circumstance that here the legal estate is in trustees can make no difference. The thing assessed is Lord Cowley's succession in the hands of the trustees, and for the purposes of assessment the legal and beneficial

interests are united (ss. 42, 44). If the Court were to hold otherwise, a testator might always evade duty, simply by placing his estate in the hands of trustees with discretionary powers of management. The words "annual value," in s. 21, refer not to the quantum of beneficial interest in the successor, having regard to his personal condition, but to the annual value of the subject matter assessed. This case differs from those where a paramount charge is deducted. Suppose, for example, the testator had given a fixed sum to the trustees as compensation for the expenses of management. That sum would then, it is true, have been deducted from the succession of Lord Cowley, but duty would have been payable on it separately. Here the trustees take no beneficial interest whatever, and therefore pay no duty personally. The will contains mere directions for management, and money paid to agents, &c., is in no sense a "charge;" nor an "incumbrance" under s. 34; nor a "contingent incumbrance" under s. 35.

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Bovill, Q.C., in reply.

POLLOCK, C.B. I believe we are all of opinion that our judgment ought to be for the Crown. The case of *In re Elwes* (1) is a direct authority, assuming that there is no distinction between the cases where the expenses claimed to be deducted are incurred individually by the successor, or, as in this case, by trustees who are acting for him. It is said they are not trustees for him only. Properly speaking they are trustees for the whole estate, but they are also trustees for him, and it appears to me that that distinction, which no doubt is a distinction in point of fact, and may be so speciously stated as for a moment to create a possible doubt, vanishes altogether as soon as we look at the entire question, and all the elements that should be considered in coming to a determination upon it. It might be said that if a man is under the absolute necessity of incurring certain expenses before he can get that which is bequeathed to him, he ought to be allowed the deductions in respect of them. If that proposition were nakedly stated it would appear to be not at all unreasonable, but the moment we look at the object of the tax, and examine upon what principle the act of parliament is to be administered, we see it to be without foundation. Certainly the

(1) 3 H. & N. 719.

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Crown ought not to receive less because a particular individual receives more. If one man has left him a 100*l.* a year, the rent of a house, for example, which he can collect in the next street, he pays upon that 100*l.* a year. If, instead of the rent being capable of collection in the next street, it is to be collected a hundred miles off, it is quite clear that no deduction can be made from the value of the succession because the property is at a great distance. I think it may be laid down as a clear deduction from the different clauses of the act, that the duty depends on the value of the property, not with respect to the expenses that the individual may have occasion to incur in the collection, but with respect to the property itself. If he has so much that he cannot possibly collect it himself, that is no reason why the Crown should get less than if it were divided among 100 or 200 people, who could each collect their shares without expense. According to the argument on the part of Earl Cowley, the more wealthy the man is by a large bequest, so much more is the Crown to lose in consequence of his inability to collect and deal with the whole. Therefore it appears to me to be quite clear that what may be called the charges of collection, and those expenses which must be incurred in reference to stewards and collectors of rents are no deductions from the claim of the Crown in respect of duty.

Again, if you look at the facts of this case, it is very true that Lord Cowley possesses—that is, the trustees possess for him—a certain amount, out of which they pay an allowance at their pleasure; but it is not pretended that more is paid than is necessary, and it may be taken, therefore, that no more is paid than Lord Cowley would have had to pay if the property had been left directly to him, subject to all these charges. Then the question remains, whether the intervention of trustees should create any difference? It appears to me, that though there is an apparent difference in point of name, there is no real difference in point of fact, and for these reasons I think our judgment should be for the Crown.

MARTIN, B. I am of the same opinion. The substantial question in this case is, whether, in ascertaining the amount of the property on which the calculation is to be made for succession duty, the expenses of management are to be deducted. It seems to me

that the case of *In re Elwes* (1) has decided the point, and that that case is an authority for our judgment here. But when we look at s. 44 of the act, I apprehend there can be no doubt about it, for that section enacts, that “the following persons, besides the successor, shall be personally accountable to Her Majesty for the duties payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them, that is to say, trustee, guardian, &c., in whom any property, or the management of any property subject to such duty, shall be vested”; and the section proceeds to enact that such persons shall be authorized to pay or commute any duty, and retain out of the property subject to such duty the amount thereof. And I apprehend, therefore, that if these trustees had been called upon to make a return instead of Lord Cowley, they would not upon the authority *In re Elwes* (1) be entitled to deduct the 1100*l.* But I also think that s. 21, coupled with s. 34, establishes the same thing; for the interest of the successor is to be considered “the value of an annuity equal to the annual value of such property” after making such allowances as thereafter directed. Section 22 then directs certain allowances, and the allowance claimed is not within them. Section 34 then enacts what shall be the value of the property, and what allowances shall be made in respect of incumbrances and moneys laid out by the successor in substantial repairs or permanent improvements, “provided that upon any successor becoming entitled to real property, subject to any prior principal charge, an allowance shall be made to him *only* in respect of the yearly sums payable by way of interest or otherwise on such charge, as reducing the annual value pro tanto of such real property.” It seems to me, therefore, that there is an express enactment, that in estimating the value of the property in respect of which this duty is to be paid, deductions ought not to be permitted of the expenses of the agent and receiver in the management of the property. I own I think it is a clear point, and that it cannot be that the mode of estimating this succession duty shall depend on the skill with which the conveyance is prepared by the conveyancer who has it in hand, and we must look (according to what is laid down in the House of Lords [*Lord Saltoun v. Advocate General of Scotland*: 3 Macq. 659]) as the proper mode

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of looking at this act of parliament) at the substantial and general intention of the legislature as therein expressed. In my opinion, therefore, the Crown is entitled to our judgment.

BRÄMWELL, B. I am of the same opinion. The question turns on s. 21 of the act, which says that the interest of every successor, except as therein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property. Now, supposing it stopped there, there can be no doubt that the interest of Lord Cowley would be an interest of the value of this property without the deduction claimed. But the section goes on with these words, "after making such allowances as are hereinafter directed"; and the only section thereby referred to is s. 22. Now, I am strongly inclined to think that s. 22 is of no operation, and that if it had not been there, still all the allowances for which it provides would have had to be made. However, whether it is necessary or not, all it extends to is an allowance for "all necessary outgoings." Now, it is argued that these words refer to all outgoings which the owner cannot help, but I do not think that is the true meaning. It means, not all such outgoings as the predecessor may have thought fit to expend, and which, therefore, in that sense are "necessary," but all such as are *intrinsically* necessary—such outgoings as it was not in the option of the predecessor to expend or not as he pleased. I concur in the reasoning of my Brother Watson in the judgment *In re Elwes* (1), and I think, therefore, that these expenses are not "necessary outgoings." But Mr. Bovill has ingeniously argued that the duty must be a charge on Lord Cowley's beneficial interest. But in sections 21 and 22 you do not find the words "beneficial interest," but "annual value of the property," to ascertain which the abatement of necessary outgoings is to be made.

Again, we are told this is a case of some hardship, because if the property instead of being left to trustees had been left to Lord Cowley directly, it would have been in his option to say whether he would have employed these agents or not, or whether he would have paid so much in any event as trustees have paid. But if this is an argument at all, it is met by the counter argument, that if we were to allow this deduction it would be in the

(1) 3 H. & N. 719, 723.

power of every testator by a mere contrivance to make his beneficial devisee liable to a less succession duty than he otherwise would be liable to as successor.

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My judgment therefore is for the Crown, and it is based on the authority of *In re Elwes* (1), and on the consideration that the tax is to be assessed on the "annual value of property," making allowance for necessary outgoings, which I hold to mean outgoings intrinsically necessary, and not those which become necessary, owing to the arrangements which the testator thinks fit to adopt.

CHANNELL, B. I am of the same opinion. The foundation of our jurisdiction is the petition which has been presented on the part of Lord Cowley, which I consider raises only one question, viz., that of the quantum of assessment, that is, whether, according to the prayer of the petition, Lord Cowley is entitled to have, under s. 22 of the act, an allowance in respect of certain deductions he claims. Our answer must depend on the construction we are to place on s. 22. By s. 21, the assessment upon any property is directed to be made according to the value of an annuity, "equal to the annual value of such property after making such allowances as are hereinafter directed." In s. 22, we find the words "annual value of lands" again repeated, and then the section provides for certain deductions. We are, therefore, to look at the annual value after making certain allowances. We have two things then to ascertain: first, what is the annual value? secondly, what deductions are to be made? Now, it appears to me that neither s. 22, nor any of the other sections which were more slightly alluded to in the course of the argument, provide for the deductions that are now claimed. If, therefore, there were no authority on the point, I should come to that conclusion; but, I conceive, though there is a difference in point of fact between the present case and the case of *In re Elwes* (1), that in principle it is a decision in support of and warranting the judgment which the Court now pronounces. I am therefore of opinion that the Crown is entitled to our judgment.

Judgment for the Crown.

Attorney for the Crown: *Solicitor of Inland Revenue.*

Attorneys for the prosecution: *Coverdale & Co.*

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RYALLS *v.* LEADER AND OTHERS.

May 26.

Defamation—Privileged communication—Protection to Report of Judicial Proceedings—Public Court—Registrar in Bankruptcy—Examination of Bankrupt in Gaol—24 & 25 Vict. c. 134, ss. 101, 102.

Proceedings held in gaol before a registrar in bankruptcy, under the Bankruptcy Act, 1861, ss. 101, 102, upon the examination of a debtor in custody, are judicial and in a public court. A fair report, therefore, of those proceedings is protected.

DECLARATION on a libel published of the plaintiff by the defendants, in a newspaper called the “Sheffield and Rotherham Independent.”

Plea. Not guilty. Issue thereon.

The libel complained of was contained in a report of an examination of a debtor in custody, held in York Castle, before the registrar of the Leeds Bankruptcy Court, pursuant to the provisions of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), ss. 101, 102; and it conveyed an imputation on the solvency of the plaintiff, who had been the debtor's partner. The cause was tried at the last Leeds spring assizes before Keating, J., when, the publication of the defamatory matter having been proved, the learned judge told the jury that “the libel was a privileged communication, and that the defendants were entitled to the verdict if the jury thought that the libel was a fair report of the proceedings before the registrar of the Court of Bankruptcy, and published without malice.” The report contained no original comment on what passed. The jury found a verdict for the defendants.

The Bankruptcy Act, 1861, sec. 101, enacts that the commissioner or county court judge shall, in certain cases, make an order that the registrar in bankruptcy of the district, where the gaol is situate, shall attend at the gaol and examine the prisoners there touching their estate, effects, debts, dealings, and transactions. Notice of the order is to be given to the gaoler, and to the execution or detaining creditors, and the registrar is to have power to make an adjudication order. By sec. 102, when a prisoner refuses to appear, or to be sworn, or to answer all lawful questions of the registrar, detaining creditor, or any other creditor who shall be present, respecting his debts, or to make a full discovery of his estate, or to

sign his examination, the registrar may report the same to the Court, and the prisoner may be committed by the Court to prison for one month.

In Easter Term last, a rule nisi was obtained for a new trial on the ground that the learned judge had misdirected the jury in telling them that the libel was privileged, and the defendants entitled to a verdict if the report was fair and published without malice.

May 26. *Overend, Q.C.*, and *Cave*, shewed cause. This is a report, without any additions, of what occurred, and it is therefore "fair:" *Lewis v. Levy* (1); *Andrews v. Chapman* (2); and in order to entitle it to protection it is sufficient if the proceedings reported are judicial, if a knowledge of them is important to the public, and if those persons who are especially interested are entitled to admission. All these elements exist in the present case. The proceedings are judicial, for the registrar in bankruptcy exercises judicial functions. He has power to make an adjudication (Bankruptcy Act, 1861, s. 52), and to hold meetings generally for the prosecution of any bankruptcy (s. 58), and under s. 101, to examine a debtor in custody, "touching his estate, effects, dealings and transactions," to adjudicate him bankrupt, and if he prove contumacious, to make a report to the Court, which may result in his commitment to gaol (s. 102). Again, the knowledge of what passes at the examination is important to the public, who may be determined thereby whether or not to give the bankrupt credit. Lastly, the creditors have an opportunity of being present. They are entitled to notice of the order appointing the examination (s. 101). If the proceedings are judicial, it is not necessary that the court should be "public" in its widest sense. Thus, a report of proceedings before a judge at chambers, on an application under 5 & 6 Vict. c. 122, s. 42, to discharge a bankrupt out of custody, has been held protected. *Smith v. Scott*. (3)

[CHANNELL, B., referred to s. 54, whereby persons summoned are bound to attend before the registrar under pain of process of contempt, and are liable to the penalties of perjury for false swearing before him.]

(1) 27 L. J. (Q.B.) 282.

(2) 3 C. & K. 286.

(3) 2 C. & K. 580.

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Sections 50—58 all tend to prove that the registrar is a judicial officer.

Manisty, Q.C., T. Jones, and J. Gully, in support of the rule. First, this proceeding is not judicial. The registrar, though he is for some purposes, as when he is acting for the commissioner, a judicial officer, is not so when acting under ss. 101, 102 of the act. His functions then are ministerial. He has simply to inquire into the debtor's affairs, and cannot hear any evidence except that of the prisoner. The commissioner could not act under these sections if he wished. They are to be read separately and give a limited statutory power to the registrar, and to him alone for the purposes of inquiry. Secondly, the court is not "public." A "public court" means a court with an open door. Here the proceedings are conducted in the privacy of the gaol, and the fact that the detaining creditor may be present does not make the court public.

[BRAMWELL, B. Sec. 102 contemplates the possibility of *any creditor* being present.]

At any rate the persons present are confined to creditors. Thirdly, assuming the court to be public and the proceedings judicial, this report is still not protected, because the libel complained of was upon a third party and was not relevant to the inquiry. And even granting that it was relevant, no case has decided that proceedings in a court of justice implicating the reputation of a third person are under any circumstances privileged. In *Lewis v. Clement* (1) the question was left undecided, and in *Rex v. Carlile* (2) the principle that the whole of a fair report is not necessarily privileged was recognised.

POLLOCK, C.B. I am of opinion that my Brother Keating was right in his ruling. The complaint here made is that certain proceedings held by a registrar in bankruptcy in York Castle, and published by the defendant, were libellous on the plaintiff. The defence is, that the alleged libel was contained in a fair, correct, and bonâ fide report of what took place; and if these proceedings were in a public court, and the publication was fair, there is no foundation for this action. The only question then is, whether

(1) 3 B. & A. 702.

(2) 3 B. & A. 167.

the registrar's court was under the circumstances a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair bonâ fide statement of proceedings there. The jury found that the publication of this report was bonâ fide, and the verdict, therefore, ought not to be set aside.

MARTIN, B. I am also of opinion that the learned judge was right in his direction. The case depends on whether there is a protection to a report of what occurred before a registrar in bankruptcy in examining a debtor in custody, and I have no doubt that there is such a protection. By ss. 50 and 51 of the Bankruptcy Act, 1861, it is enacted that the several courts exercising jurisdiction under the act, may take evidence in the modes specified, and that the commissioners may sit, in cases where they can do so without detriment to the public advantage, in chambers. The object of this enactment is that the matters which come before the court, may, as a rule, be discussed in public, the legislature being of opinion that only in matters where it could be done without detriment to the public advantage, the judge might sit at chambers. Then s. 100 provides for a great evil. Persons used to remain in prison voluntarily, thus, at the cost of an inconvenience to themselves, setting their creditors at defiance. It enacts that the gaoler is to make a monthly return of all prisoners in his custody for debt, and whether they are willing or not to petition the court of bankruptcy, and upon that (s. 101) the county court judge orders the registrar to attend at the gaol to examine the prisoners, notice being given to the execution creditor who detains, and to the gaoler. Then a power to adjudicate against every such prisoner, to grant him protection and to release him, is given; a power which ought to be exercised in public. Section 102 further enacts that where a prisoner refuses to answer the questions put to him, to discover his estate, or to sign his examination, the registrar shall report the same to the Court, and the Court may, therefore, commit such prisoner to gaol for a month. Can any one contend, that a matter for which one month's imprisonment may be given, is not one for the public to have reported to them? Is not an adjudication in such a matter properly to be held in public?

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I think that it is, and therefore that this report, being made bonâ fide, is protected.

BRAMWELL, B. * I am of the same opinion. I think that this court was a public court. That is shewn from the terms of ss. 101 and 102. And even if it were not so, yet if the officer who holds it chooses to make it public, it would be public for this purpose. Then as to the point made, that nothing ought to be published affecting a third party, even when relevant to the inquiry, I think there is no such restriction. Those who are present hear all the evidence, relevant or irrelevant, and those who are absent, may, as far as I can see, have all that is said reported to them. The doctrine contended for is an entire novelty, because, if sound, every witness might bring an action against the newspaper publisher reporting his evidence, and call upon that publisher to prove all the libellous statements which might be contained in his examination or cross-examination. I do not think that there is any such qualification as that suggested, nor do I concur in the other suggestion made to us, viz., that what is *irrelevant* and libellous on a third person is not protected. There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy. My opinion is, that when once you establish that a court is a public court, a fair bonâ fide report of all that passes there may be published. Possibly this privilege is applied to courts of justice, because needless scandals are usually avoided in them. I am therefore of opinion that this rule should be discharged.

CHANNELL, B. I am of the same opinion. By s. 52 of the Bankruptcy Act, 1861, large powers are given to a registrar in bankruptcy to act judicially in court or in chambers, and those powers are further explained by ss. 58 and 61. Now it is not contended that if this proceeding had been held under these sections at chambers or in court, it would not have been a proceeding in a public court. But it is said that the examination having been held under ss. 101 and 102, the judicial and public character given to the registrar's proceedings under s. 52 and the following sections does not belong to this inquiry. In my opinion that is to put a narrow construction on the act. Section 100 enacts that the gaoler is to make a return of prisoners for debt in his custody, and

whether they are willing or refuse to petition the Court, and s. 101 directs the commissioner or county court judge to send the registrar to examine these prisoners touching* their estate and effects, debts, dealings, and transactions. It is clear that the proceedings of the registrar at the gaol are on a somewhat different footing from those under the earlier sections. But that is no ground for holding that they are not of a judicial character, or—if that be necessary—that the court is not a public court. For s. 101 is followed by s. 102, enacting that when a prisoner refuses to answer the questions put, or to discover his estate, or to sign his examination, the Court, on the registrar's report, may sentence him to a month's imprisonment. Therefore, I think, looking at what the registrar is empowered to do in the gaol, that his proceedings are in a public court. But putting that consideration aside, I think that, supposing the proceeding is of a judicial character, then, if the judge leaves his court open to the parties interested, that is enough to give protection to a report of what occurs.

Then it is objected that this report reflects on the character of a third person, and that therefore it is not protected. I am, however, by no means prepared to concur in that proposition. Wherever the report is of something not wholly irrelevant, there at any rate the fact that it contains reflections on a third person, does not prevent the reporter from being protected. Now here the report was of a statement by the bankrupt as to his partner's position, and that is certainly not so irrelevant as to deprive the defendant of his protection. On all grounds therefore, I think the rule ought to be discharged.

Rule discharged.

Attorney for plaintiff: *A. Duncan.*

Attorneys for defendants: *Torr, Janeway, & Tagart.*

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O'BRIEN v. BRODIE.

May 20.

Debtor and creditor—Bankruptcy—Execution creditor—Bankruptcy Consolidation Act (12 & 13 Vict. c. 106) s. 184—Interpleader Act (1 Wm. 4, c. 58.)

Where an execution is levied by seizure, but the sale is suspended by an interpleader order, and before sale a petition for adjudication of bankruptcy is filed against the execution debtor, on which he is afterwards adjudged bankrupt, the case is within the Bankruptcy Consolidation Act (12 & 13 Vict. c. 106), s. 184, and the execution creditor is deprived of the benefit of his execution.

THE plaintiff in this action having obtained judgment for 182*l.*, issued on the 20th December a writ of *fi. fa.* against the defendant's goods, and the writ was on the same day executed by the seizure of goods on the defendant's premises. The goods so seized were claimed by a third person under a bill of sale, and the sheriff took out an interpleader summons.

Upon this summons an order was, on the 23rd December, made; directing that, on payment of 200*l.* into court by the claimant within seven days, or upon giving within the same time security to the satisfaction of one of the masters for payment of that sum, and upon payment of the sheriff's possession-money from the date of the order, the sheriff do withdraw from the possession of the goods seized; but that, in default of such payment or security within the time aforesaid, the sheriff do proceed to sell the goods, and pay the proceeds (after deducting expenses of sale, and possession money from the date of the order) into court, to abide further order; the order further directed an interpleader issue, in which the claimant should be plaintiff and the execution creditor defendant, the issue to be prepared and delivered by the plaintiff therein within five days. The terms of this order were not complied with by the claimant.

On the 30th December, the defendant filed his petition in bankruptcy, and was adjudged bankrupt, and on the same day the official assignee gave notice to the sheriff that he claimed the goods seized; but on an interpleader summons, taken out by the sheriff, an order was made by Martin, B., barring this claim.

On the 10th January, the sheriff sold the goods by auction; and after deducting expenses, fees, and rent, paid the balance of 51*l.* into court under the order of the 23rd December. Upon a summons

taken out by the plaintiff, an order was made by Martin, B., for payment out of court to him of the 51*l.*; but the learned judge suspended that order until another summons, taken out by the creditors' assignee of the defendant's estate, to set aside the order and for payment of the money to the assignee, should be disposed of. The latter summons was afterwards heard by Martin, B., who, thinking that the point had been decided by Willes, J., at chambers (1), referred the matter to the Court, and

Hannen, having obtained a rule accordingly on behalf of the assignee,

Holl shewed cause in the first instance. (2) The question turns

(1) See this case referred to; *post*.

(2) The sections of the Bankruptcy Acts referred to are as follows:—12 & 13 Vict. c. 106, s. 133. "All payments really and bona fide made by any bankrupt, or by any person on his behalf, before the date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt . . . and all executions and attachments against the goods and chattels of every bankrupt bona fide levied by seizure and sale, before the date of the fiat or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with or paying to, or being paid by such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have been issued, had not at the time of such payment . . . or at the time of executing or levying such execution or attachment, or at the time of making sale thereunder, notice of any prior act of bankruptcy by him committed."

S. 184. "No creditor having security for his debt . . shall receive upon any such security . . . more than a rateable part of such debt, except in respect of any execution or extent served and levied by *seizure and sale* upon, or any

mortgage or lien upon, any part of the property of such bankrupt before the fiat or the filing of a petition for adjudication of bankruptcy."

24 & 25 Vict. c. 134, s. 73. "If any execution shall be levied by *seizure and sale* of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels: provided always, that, unless in the meantime a petition for the adjudication of bankruptcy against the debtor be presented, the sheriff or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto, notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, but the sheriff or other officer shall not incur any liability by reason of anything done by him as aforesaid."

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on 12 & 13 Vict. c. 106, s. 184, which deprives the creditor of the right to recover more than the rateable proportion of his debt out of an execution not levied by seizure and sale before the filing of the petition. That is the only section applicable, for s. 133, whereby notice of an act of bankruptcy received before execution of the writ by seizure and sale deprives the creditor of the benefit of the execution, refers only to notice of an act of bankruptcy committed prior to the seizure: *Edwards v. Scarsbrook* (1); whereas here the act of bankruptcy was the filing of the petition, which was subsequent to the seizure; and s. 73 of 24 & 25 Vict. c. 134, does not apply, since the adjudication is founded on the debtor's petition, and not on the execution as an act of bankruptcy.

With respect, then, to s. 184, it is true that *Hutton v. Cooper* (2), decides that the *seizure and sale* must both have occurred previous to the filing of the petition, in order to enable the creditor to retain the benefit of his execution; and *Young v. Roebuck* (3) follows that case. But the claim of the creditor in this case is founded on the fact that his action was suspended by the interpleader order, and that the 184th section was only intended to apply to the case of a writ executed at common law. If the creditor had been allowed to take his own course, and the sheriff to act under the writ, the goods would have been sold before the filing of the petition, or the creditor would have been entitled at once to take an assignment of them to himself in lieu of his debt. But the interpleader order suspended the proceedings, and took the goods out of the control of the sheriff. The sheriff therefore acted no longer under the writ, but under the order of the Court, and when the goods were at last sold they were sold under that order. The delay was occasioned for the benefit of the sheriff and of a third party who never ventured to prosecute his claim, and it cannot have been intended by the statute that the creditor should be prejudiced in such a case, but the rights of all parties must be determined with reference to the time when the order was made, and as if the sale had then taken place. As was said by Blackburn, J., in *Murray v. Arnold* (4), of money paid into court under a judge's order before bankruptcy,

(1) 3 B & S 280; 32 L. J. (Q.B.) 45.

(3) 2 H. & C. 296; 32 L. J. (Ex.)

(2) 6 Exch. 159; 20 L. J. (Ex.) 260.

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(4) 3 B. & S. 287; 32 L. J. (Q.B.) 11.

the goods were here "clogged with a trust" for the benefit of the creditor. [He also referred to a case of *Lloyd v. Parsons* (1), decided by Bramwell, B., at chambers, and followed by Willes, J., which was probably the case referred to at chambers by Martin, B.]

Hannen, in support of the rule. The 133rd section applies only as shewing the intention of the legislature to restrict the privileges of the execution creditor; s. 184 carries back the restriction to the filing of the petition, but s. 133 carries it back to a prior act of bankruptcy, unless both seizure and sale have been made before notice. The 73rd section of 24 & 25 Vict. c. 134, goes still farther, by making the levy by seizure and sale itself an act of bankruptcy, and taking away all benefit from the creditor, if an adjudication is obtained within fourteen days of the sale. But the real question turns on the construction of s. 184, the words of which are precise and unqualified, that the creditor is to receive no more than a rateable part of the debt, unless the execution has been levied by seizure *and* sale. The claim which delayed the sale, though made *bonâ fide*, may have been withdrawn, from the fact that the claimant knew that the goods were in the order and disposition of the bankrupt at the time of the seizure, which might under 24 & 25 Vict. c. 134, s. 73, have been treated as an act of bankruptcy. But however this may be, the contest is not between the creditor and the claimant, but between the execution creditor and the assignee representing all the creditors, and they cannot be deprived of the benefit given them by the words of the statute, by the conduct of a third person. Suppose, however, the goods had actually been sold on the day when the order was made, the assignee would, by 24 & 25 Vict. c. 134, s. 73, have been entitled to recover the proceeds from the creditor, as the adjudication of bankruptcy would have been within fourteen days of the sale.

[BRAMWELL, B. How do you deal with the argument that after the order the creditor had a lien of a different character from that given him by the execution?]

His rights are still rights under the writ; he is only restrained from realizing his security, and when the sale is ultimately made, it is made by the authority of the writ, not of the order, which did not give the power of selling, but only suspended it. The

(1) See note at end of case.

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case decided by Bramwell, B., was different, as it appears that the sale was completed, and the execution was therefore at an end before the bankruptcy, and therefore s. 184 did not apply.

POLLOCK, C.B. This is a contingency not provided for, but if we did not hold the assignee entitled, we should be legislating under the name of interpreting the statute. Taking the language of the statute as it stands, the clear result is, that if goods of a bankrupt are seized under a writ of execution, it avails the creditor nothing, provided a petition for adjudication of bankruptcy is filed before the levy is fulfilled by sale. Very specious, and even just and equitable, grounds were suggested to us, on which we were urged to hold that s. 184 does not apply to a case like this, where the ordinary action of the writ is suspended. But there are no words to justify us in coming to that conclusion. Doubtless the interference with the execution of the writ which the interpleader order caused, was not intended to produce this result; and probably, for the future, judges will be careful how they arrest the sheriff's action, and will leave him to sell, in order not to deprive the execution creditor of his advantage. But though I feel the force of Mr. Holl's suggestions, the language of the act is too strong to be got over or explained away. It provides distinctly that on seizure without sale before the petition, the execution creditor is to have no more than a rateable part of his debt, and the rule must therefore be made absolute to pay over the money in court to the assignee.

MARTIN, B. I am of the same opinion. During a portion of the argument I was under the impression that s. 73 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), had been relied on before me at chambers, but I believe that my memory was running upon another occasion. If I had to put a construction on the Interpleader Act (1 Will. 4, c. 58), and 12 & 13 Vict. c. 106, taken together, independently of any other statute, I should say that the interference of the judge under the former act took the case out of s. 184 of the latter, and that the creditor ceased to have a security for his debt within that section, the goods being then in *custodiâ legis*. But on s. 73 of the Bankruptcy Act, 1861, it is clear, that if the judge had said to the sheriff, "You have seized—sell and act as the law directs you," the assignee would by that section have

been entitled to the proceeds of the sale, inasmuch as the bankruptcy took place within fourteen days. Putting these two sections together, it is clear that the legislature intended that in such a case the general body of creditors should have the benefit of the goods, and if this is their intention, it is our duty to carry it out.

BRAMWELL, B. I am of the same opinion. The statute (12 & 13 Vict. c. 106, s. 184) says in substance, that no execution creditor shall receive upon his execution more than a rateable part of his debt, except in respect of an execution levied by seizure and sale before petition. Now, if the execution creditor receives this money, he will receive more than a rateable part of his debt, and the question therefore is, whether he will receive it in respect of an execution; for if so, inasmuch as that execution had not been levied by seizure and sale before the filing of the petition for adjudication, the case is within s. 184. But he certainly will, if he receives this money, receive it by virtue of an execution. Our judgment must therefore be against him; but I do not understand this to be inconsistent with the case decided by me at chambers. (1)

(1) This case was reported by *Holl* as follows:—

PARSONS AND ANOTHER V. LLOYD.

Goods were seized by the sheriff of Surrey under a *fi. fa.*, which were claimed by a mortgagee. The sheriff interpleaded, and Martin, B., ordered a sale, and that the proceeds, after deducting the amount of the mortgagee's claim, should be paid to the execution creditor to the amount of his execution. The sheriff sold under this order; the debtor afterwards became bankrupt, and his assignees claimed the proceeds. The sheriff called on the assignees and execution creditor to interplead, and the parties having agreed to abide by the decision of Bramwell, B., his lordship gave judgment as follows:—

BRAMWELL, B. Though, as there is no appeal my reasons are unimportant, I wish the parties to see that I have duly considered the matter.

The execution creditor would be en-

titled, notwithstanding the bankruptcy, but for some special provision in the Bankruptcy Acts, because the assignee succeeded to the rights of the bankrupt as he possessed them, which was subject to the execution.

Then, is there any such special provision? I think not. I think s. 184 does not apply; the goods were not subject to a common law execution, which that section deals with.

The Common Law Procedure Act (1860) gives the execution creditor a lien in respect of which there is no special provision in the Bankruptcy Acts, unless it be the one in s. 184 as to liens. In this case the defendant might have given a second mortgage on these goods, which would have been perfectly valid. He did not, but Baron Martin, by his order, having full power, did. In short, the execution, as such, was at an end by this order, and the plaintiffs had a lien as security by other means, valid against a subsequent bankruptcy.

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CHANNELL, B. This is a point of great importance, and it is to be regretted that it arises in a case in which there is no appeal from our decision. But I am clearly of opinion that the rule must be made absolute. The question turns on the construction of s. 184 of the act of 1849, on which some light is thrown by s. 133. The words of the former section are extremely strong, and if no Interpleader Act had been passed, and no application been made to a judge, there could be no doubt that a plaintiff who had levied a *fi. fa.*, but not sold, would be a creditor who had a security for his debt, and would, by s. 184, be deprived of his advantage. But Mr. Holl says that the fact that the judge has made an order, takes the creditor out of the class of creditors having security within s. 184. I cannot, however, put that construction on the statute, and I come to this conclusion on the words of the section itself; but although that would be my construction of the words taken alone, yet our decision is strongly fortified by the course of legislation, and by s. 73 of the Bankruptcy Act, 1861.

Rule absolute.

Attorneys for plaintiff: *Smith, Fordon, & Low.*

Attorneys for assignee: *Lawrance, Plews, & Boyer.*

May 30.

PEARSON v. PEARSON.

Debtor and Creditor—Trust Deed for benefit of Creditors—Registration—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). ss. 192, 194, 197.

Section 197 of the Bankruptcy Act, 1861, applies only to deeds registered under ss. 192, 193, and not to deeds registered under s. 194.

Ex parte Morgan (1), followed.

DECLARATION for money payable, for money received, interest, and money due on accounts stated.

Plea. That after the accruing of the plaintiff's claim, the plaintiff was indebted to divers persons, and thereupon a deed was entered into between the plaintiff and R. J. Wright and R. Easton, as trustees on behalf of the thereunder signed creditors of the

(1) 32 L. J. (Bkr.) 15.

plaintiff, whereby the plaintiff conveyed all his estate and effects to the said trustees absolutely, to be by them applied and administered for the benefit of the plaintiff's creditors, in like manner as if the plaintiff had been at the date thereof duly adjudged bankrupt; and all things, &c., having happened to render the said deed binding on the creditors of the plaintiff, under the Bankruptcy Act, 1861, and to vest the debts and causes of action in the declaration mentioned in the said trustees, the said debts and causes of action became vested in the said trustees, for the benefit of the plaintiff's creditors as aforesaid.

Replication, that the said deed was registered under and by virtue of the 194th section of the Bankruptcy Act, 1861, and the same was not, under and according to the 192nd section of the said act, within twenty-eight days from the day of the execution of the said deed produced and left (having been first duly stamped) at the office of the chief registrar of the court of bankruptcy, for the purpose of being registered, and together with such deed there was not delivered to the said chief registrar, an affidavit by the plaintiff, or some person able to depose thereto, or a certificate by the said trustees or either of them, that a majority in number representing three fourths in value of the creditors of the defendant, whose debts amounted to 10*l.* and upwards, had, in writing, assented to and approved of the said deed, and stating the amount in value of the property and credit of the plaintiff comprised in such deed.

Demurrer and joinder.

Dowdeswell, in support of the demurrer. The causes of action are vested in the trustees under s. 197, which applies to deeds registered under s. 194, as well as to deeds registered under s. 192. (1)

(1) S. 192 of the Bankruptcy Act, 1861, contains, with regard to deeds of arrangement between a debtor and his creditors, the following, amongst other provisions:

"Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been

first duly stamped) at the office of the chief registrar for the purpose of being registered."

"Together with such deed or instrument, there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustees or trustee, that a majority in number,

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[MARTIN, B., referred to *Ex parte Morgan* (1), as shewing that s. 197 only applied to deeds made and registered under s. 192. He also referred to the judgment in *Ex parte Spyer* (2), as being to the same effect.]

These cases merely decide that s. 197 applies to deeds under s. 192. It does not follow that it may not also apply to deeds registered under s. 194. The words are from and after the registration of every such deed.

[MARTIN, B. Section 198, giving protection to the debtor, after notice of the filing, &c., of the deed, only applies to deeds under s. 192; per Lord Westbury, C., in *Ex parte Morgan*. (1)]

That section contains the words "after notice of the filing and

representing three fourths in value of the creditors of the debtor whose debts amount to 10%. or upwards, have, in writing, assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed."

S. 193 enacts, that the particulars of the deed, with a short statement of its nature and effect, shall be entered by the Chief Registrar in a book to be kept exclusively for the purposes of such registration; such entry to be made within forty-eight hours after the deed has been left with the Registrar, and a copy of such entry to be published, within four days of its being made, in the *London Gazette*.

S. 194 enacts, that "every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys, or covenants, or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors . . . shall, within twenty-eight days from and after the execution thereof by such creditor, or within such further time as the Court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence."

S. 197 enacts, that, "from and after the registration of every such deed or instrument in manner aforesaid, the debtors and creditors and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of, and be liable to, all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument and the creditors under the same shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy."

(1) 32 L. J. (Bkr.) 15.

(2) 32 L. J. (Bkr.) 62.

registration of such deed has been given *as aforesaid*," and there is no antecedent provision as to notice except in s. 192.

[BRAMWELL, B. The language of s. 197, as to the creditors, parties to such deed or who have assented thereto, or are bound thereby, seems to limit the application of the section to deeds under s. 192.]

The clauses are used disjunctively. If deeds under s. 192 had alone been contemplated, the word "creditors" would have been sufficient. By adding the words "or who have assented to, or are bound thereby," an intention is shewn to include deeds to which creditors have not assented, or by which they are not bound.

E. L. O'Malley, *contrà*, was not called on.

POLLOCK, C.B. The question in this case really is, whether section 194 of the Bankruptcy Act, 1861, is parenthetical, or whether it is to be considered as one of the series of sections with respect to deeds of arrangement. I am of opinion that it is inserted by way of parenthesis only, and to meet the circumstances mentioned by Lord Westbury in his judgments in *Ex parte Morgan*. (1) The opinion there expressed I regard as the true construction of the act. I therefore think this deed, not being registered in the mode prescribed by ss. 192 and 193, but merely under s. 194, did not transfer the debt sued for to the trustees. My judgment accordingly is for the plaintiff.

MARTIN, B. I am of the same opinion. It seems to me that section 194 is parenthetical only. It could not have been intended by the legislature that a debtor, by a deed to which none of his creditors had assented, and of which they might be entirely ignorant, should be able to transfer the whole of his property to trustees. I think, moreover, that the judgments of the Lord Chancellor, in *Ex parte Morgan* (1), and *Ex parte Spyer* (2), rule this case: and to the same effect is his judgment in *Ex parte Smith re Smith* (3), where a case which had been before me at chambers was under his consideration. It is contended indeed, that there is a difference between ss. 197 and 198, because the latter contains the words "after notice of the filing and registration of such deed as aforesaid," and s. 192 is the only preceding section requiring

(1) 32 L. J. (Bkr.) 15, 17. (2) 32 L. J. (Bkr.) 62. (3) 10 L. T. (N.S.) 551, 386.

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such a notice. It is true there are no similar words in s. 197; but there, as in s. 198, the expression used is, "every such deed," and these words, Lord Westbury thought, applied only to deeds registered in the manner pointed out by s. 192.

BRAMWELL, B. I am of the same opinion. No doubt, according to our construction, the words "every such deed" require to be read as "every such deed as in s. 192 mentioned." That is an obvious *primâ facie* objection. But it would manifestly be a most extraordinary thing if a debtor might execute a deed, transferring his whole property to a trustee of his own choice, without the knowledge or assent of any of his creditors. Now, s. 198 gives protection to the debtor, "after notice of the filing and registration of such deed has been given as aforesaid;" and it is admitted that this section does not include deeds registered under s. 194. If, therefore, we must interpolate some such words as I have mentioned there, no sufficient reason has been given why we should not do so in s. 197, to obviate the absurd consequences which would otherwise ensue. Again, s. 197 speaks of the creditors "parties to such deed, or who have assented thereto, or are bound thereby," and this phraseology is not consistent with precise speaking, if Mr. Dowdeswell's construction is the true one. The section should then have run as follows:—"From and after the registration, &c., as well when there are creditors parties to such deed, or who have assented thereto, or are bound thereby, *as when there are no such parties.*" The reason of the thing, therefore, the admitted necessity of adding the words in s. 198, which must upon our construction be added here, and the inaccuracy of expression in the section to which I have just referred, assuming Mr. Dowdeswell's contention to be well founded, concur in making me think, that the provisions of s. 197, apply only to deeds entered into in conformity with the provisions of s. 192.

CHANNELL, B. I agree with the rest of the Court. The replication alleges that the deed in the plea mentioned was registered under s. 194 of the Bankruptcy Act, 1861, but was not, according to s. 192, left at the Registrar's office within twenty-eight days, and that there was not delivered with it an affidavit or certificate in compliance with that section. Now, in this case, whilst every-

thing has been done to register the deed under s. 194, the formalities prescribed by s. 192 have not been complied with, and the argument of the defendant is, that it is enough if the deed is registered under s. 194. But on looking at the act it appears that s. 192, contemplates a certain deed, and also enjoins a certain mode of registration. Section 193 completes the directions for registration. Then comes s. 194, which I consider parenthetical. Section 197 gives effect to the "registration of every such deed, in manner aforesaid," and I apprehend that though s. 194 alludes to other deeds, we must go back to ss. 192 and 193, to see what deeds s. 197 refers to. But I do not base my decision on the necessity of a deed being valid under s. 192, in order to its being a deed to which s. 197 applies; but on the necessity for its being registered in manner aforesaid, that is, in ss. 192 and 193 aforesaid.

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Judgment for the plaintiff.

Attorneys for plaintiff: *Turner & Turner.*

Attorneys for defendant: *Cree & Last.*

HODGSON v. SIDNEY.

 June 12.

Parties to actions—Bankruptcy—Action for false representation—Pecuniary loss—Special damage—Primary cause of action.

To a declaration for a false representation, whereby the plaintiff was induced to pay 2000*l.*, and "sustained great loss, and became and was adjudicated bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant, except as to the claim in respect of the adjudication in bankruptcy and the remainder of the personal damage alleged, pleaded that before action the plaintiff had been adjudicated bankrupt, that the loss sustained was a pecuniary loss, and that the right to sue for it passed to his assignees:—

Held, that the only damage recoverable was a direct pecuniary loss; the right to sue for which passed to the assignees; and therefore that the plea was a good answer to the whole declaration, and might have been so pleaded.

DECLARATION for a false representation whereby the plaintiff was induced to make certain advances and payments of money to one William Sidney to the amount of 2000*l.* on account of the manufacture of certain wine for exportation, "whereby and by

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reason of the said false and fraudulent representation the plaintiff has sustained great loss, and became and was adjudicated a bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit."

Second plea. Except as to the claim in respect of the plaintiff's becoming and being adjudicated a bankrupt, and suffering the alleged personal annoyance, and being put to the alleged trouble and inconvenience, and being injured in character and credit, that the said loss which the plaintiff sustained, as in the declaration alleged, was a pecuniary loss, to wit, the loss of the moneys which he so advanced and paid, as in the declaration mentioned; that after the accruing of the supposed cause of action, and before this suit, the plaintiff was adjudicated bankrupt, and thereupon an official assignee was duly appointed, and all things were done, &c., to give validity to the said adjudication and appointment, and to cause the estate of the plaintiff, including the cause of action in the declaration mentioned, and herein pleaded to, to vest, and the same did vest, in the said official assignee before this suit, and has not revested in the plaintiff.

Demurrer and joinder.

May 30. *Lumley Smith*, in support of the demurrer. Damage resulting from a tort does not pass to the assignees; *Howard v. Crowther* (1); *Brewer v. Dew*. (2)

[BRAMWELL, B. The plaintiff's only cause of action is a direct pecuniary loss. The claim as to the adjudication is clearly too remote.]

Excluding that claim, there is still special damage in addition to the pecuniary loss, in respect of which the bankrupt is entitled to recover. He has suffered inconvenience for which the jury might choose to give him vindictive damages.

Field, Q.C., contrâ. The cause of action here is *primarily* a diminution of the personal estate by 2000*l.*, and it therefore passes to the assignees, although the pecuniary loss incurred may have produced personal inconvenience to the bankrupt himself: *Drake v. Beckham* (3); *Wetherell v. Julius*. (4)

(1) 8 M. & W. 601.

(3) 11 M. & W. 315; 2 H. L. C. 579.

(2) 11 M. & W. 625.

(4) 10 C. B. 267.

[MARTIN, B. By the exception in the plea the defendant shews that some part of the cause of action passes to the assignees, and some part remains in the bankrupt. Can you split a cause of action in this manner?]

The plea is pleaded in the form indicated as correct in such a case, by Lord Abinger, C.B., and Rolfe, B., in *Brewer v. Dew*. (1) The cause of action is not really split here, for no damage capable of being recovered is alleged except the actual pecuniary loss.

Lumley Smith, in reply. There has been an independent personal wrong suffered by the bankrupt for which he alone can sue, *Rogers v. Spence* (2): and the pecuniary loss incident to the commission of the tort cannot be dissociated from the rest of the cause of action and separately pleaded to.

Cur. adv. vult.

June 12. The judgment of the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.), was delivered by

MARTIN, B. This was an action for false representation, and the plaintiff alleges that by reason thereof he "has sustained great loss, and became and was adjudicated a bankrupt, and suffered great personal annoyance, and was put to great trouble and inconvenience, and was greatly injured in character and credit." The plea which is pleaded to the whole declaration, "except as to the claim in respect of the plaintiff's becoming and being adjudicated bankrupt, and suffering the alleged personal annoyance, and being put to the alleged trouble and inconvenience, and being injured in character and credit," states that the loss sued for was a pecuniary loss, that the plaintiff became a bankrupt before this action, and, therefore, that the cause of action vested in his assignees: and to this plea there was a demurrer. We are of opinion that the plea is good on the ground that the exception is of no effect. The plea may be taken as if pleaded to the whole declaration; and, therefore, as we are of opinion that the pecuniary damage claimed and alone capable of being recovered passes to the assignees, our judgment is for the defendant.

BRAMWELL, B. I only wish to add that, assuming that there was special damage recoverable, I do not think that the cause of

(1) 11 M. & W. 625, 629, 630.

(2) 12 Cl. & F. 700.

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action can remain partly in the bankrupt to recover such damage, and partly can pass to the assignees to recover the pecuniary and ordinary damage. If two several torts had been committed there would be no reason why the bankrupt should not recover in respect of one, and the assignees in respect of the other. But where, as in this case, there is but one single cause of action resulting in direct pecuniary and in special damage, the bankrupt cannot say that enough of it remains in him to enable him to recover the special damage.

Judgment for the defendant.

Attorney for plaintiff: *A. Sidney.*

Attorney for defendant: *W. T. Elliot.*

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VANDENBERGH v. SPOONER.

Contract of sale—Statute of Frauds (29 Car. 2, c. 3.) s. 17—Names of parties.

In order to make a valid note or memorandum of a contract for the sale of goods within the Statute of Frauds, s. 17, the names of the parties to the contract must appear upon the document as such parties.

A., the purchaser from B. of goods above the value of 10*l.*, signed a document in the following terms:—"A. agrees to buy the whole of the lots of marble purchased by B., now lying at Lyme Cobb, at 1*s.* per foot":—

Held, that B.'s name not being mentioned as seller, the document was not a note or memorandum of the contract within the Statute of Frauds, s. 17.

THIS was an action for goods bargained and sold, tried before Bramwell, B., at the sittings at Westminster, in last Hilary Term. The plaintiff had purchased at a sale of wreck a quantity of marble; this the defendant agreed to buy, but afterwards repudiated his bargain, and refused payment. The value of the goods was above 10*l.*, and the only note or memorandum of the contract in writing, signed by the defendant, was as follows: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenberg, now lying at the Lyme Cobb, at 1*s.* per foot. (Signed) D. Spooner."

Evidence was also given to the effect that, after the defendant had signed this document, he wrote out what he alleged to be a copy of it, which at his request the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J.

Vandenbergh agrees to sell to W. D. Spooner the several lots of marble purchased by him, now lying at Lyme, at one shilling the cubic foot, and a bill at one month, (Signed) Julius Vandenbergh." The jury, however, were of opinion that the first document stated the contract actually made, and found a verdict for the plaintiff for 35*l.*; leave being reserved to the defendant to move to enter a nonsuit, on the ground (amongst others) that there was no sufficient note or memorandum of the contract within the Statute of Frauds.

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Karslake, Q.C., having obtained a rule accordingly,

May 22. *Huddleston, Q.C.*, and *Hannen*, shewed cause. To make a document a sufficient note or memorandum of a contract within the Statute of Frauds, it is only necessary that it should shew with reasonable clearness and certainty the parties to, and the subject matter of, the contract, and should be signed by the party to be charged. *Bailey v. Sweeting* (1); *Sarl v. Bourdillon*. (2) Now in this case it is clear that the plaintiff's name is mentioned, and the only question is, whether from that mention it can be inferred that he is the seller. The case is, therefore, not within the decision in *Williams v. Lake* (3), where the plaintiff was not mentioned at all in the guarantee, and the guarantee was, in fact, intended to be given to a different person; in substance that case was an attempt to make an ordinary contract transferable. The words, however, there used by Hill, J., are applicable; it is sufficient if the essentials of the contract appear by a *reasonable construction* of the document. It is a reasonable construction of this document, that Vandenbergh is the seller; for being stated in it to have purchased the marble, he must be presumed still to be the owner of it, and, as the only person entitled to sell, to be the person actually selling.

[BRAMWELL, B. Suppose a contract were signed in this form,—I agree to give 100*l.* for the brown horse, bred by A. B., would that be evidence of a contract with A. B. to buy the horse?]

No, because from the nature of the subject matter, that description would be given of a horse not with any reference to its present

(1) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.

(2) 1 C. B. (N.S.) 188; 26 L. J. (C.P.) 78.

(3) 2 E. & F. 349; 29 L. J. (Q.B.) 1.

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owner, but as an indication of its probable qualities, but there is no such reason for describing goods by reference to their purchaser. It may be inferred, therefore, by a reasonable intendment, that the person described as having purchased the goods is the seller.

[BRAMWELL, B. If the word *intendment* were substituted for *construction* in the judgment of Hill, J., it would be more in your favour; it may be shrewdly guessed that the plaintiff was the purchaser, but that is conjecture and not construction.]

All that is meant by Hill, J., is that you must be able fairly to collect the essentials of the contract from the document. A bill given by A., headed "A. to B.," and enumerating the goods, and stating the price, would satisfy the statute, and would bind A., if A.'s name had been written or printed by him or by his authority. But if it does not appear from the document itself who is the seller the surrounding circumstances may be looked at to shew that the seller is the person mentioned in it, and a conclusive circumstance here is, the paper signed by the plaintiff; *Macdonald v. Longbottom*. (1)

Karslake, Q.C., and *Kingdon*, in support of the rule. It is clear that the plaintiff is not mentioned *as seller* in the document, and it is only by importing knowledge of the circumstances that the inference that he is seller can be arrived at. But the case cited is no authority for ascertaining the seller by extrinsic evidence, where no one is named as seller, but only for identifying the person or the thing named or described with the person or thing intended. Further, the document signed by the plaintiff is no part of the document signed by the defendant, nor is referred to in it, and the jury have found that it does not represent the real contract; *Boydell v. Drummond*. (2) The admission of extrinsic evidence could not be justified on any principle, that would not justify admitting proof by parol of the whole contract, of which the statute requires written evidence: the circumstance required is the very circumstance that the plaintiff was a party to the contract. The contention of the other side would as justly apply to shewing the seller when his name was not mentioned at all in the document, for here the plaintiff is not mentioned *as seller*, but his name is introduced as part of the description of the goods. It would be

(1) 1 E. & E. 987; 29 L. J. (Q.B.) 256.

(2) 11 East. 142.

equally open to John Smith to prove that he was the seller, and there would be nothing in the document to contradict it. The case is therefore entirely within the decision in *Champion v. Plummer* (1); and the words there used by Mansfield, C.J. apply, "How can that be said to be a contract, or a memorandum of a contract, which does not state who are the contracting parties?" They also cited Blackburn, *Contr. of Sale*, p. 54.

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Cur. adv. vult.

June 12. The judgment of the Court (Pollock, C.B., Martin, Bramwell and Channell, BB.), was delivered by

BRAMWELL, B. The question we have had to consider in this case is, whether the document relied upon by the plaintiff was a sufficient note or memorandum in writing to bind the defendant under s. 17 of the Statute of Frauds. The document was signed by the defendant, and was in the following terms: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenberg, now lying at the Lyne Cobb, at 1s. per foot." Can the essentials of the contract be collected from this document by means of a fair construction or reasonable intendment? We have come to the conclusion that they cannot, inasmuch as the seller's name *as seller* is not mentioned in it, but occurs only as part of the description of the goods.

MARTIN, B. I am not well satisfied as to what is the real meaning of the document, but I am not prepared to differ from the rest of the Court.

Rule absolute.

Attorneys for plaintiff: *Trehern, Whites, & Renard.*

Attorneys for defendant: *Benbow, Tucker, & Saltwell.*

(1) 1 B. & P. (N.R.) 252, 254.

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June 2.

BAINES AND ANOTHER v. EWING.

*Principal and Agent—Extent of Authority—Secret Limit—Underwriter—
Marine Insurance—Custom at Liverpool—Divisibility of Claim.*

The defendant authorized an insurance broker at Liverpool to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed 100*l.* by any one vessel. The broker, acting in excess of this authority, and without the knowledge of the defendant, underwrote a policy for the plaintiff for 150*l.* The plaintiff was not aware that the broker's authority was limited to any particular sum, but it is notorious in Liverpool that in nearly all cases there is a limit of some sort, which remains undisclosed to third persons, imposed on brokers by their principals. In an action upon the policy:—

Held, 1st, that the defendant was not liable for the whole amount underwritten, the broker having exceeded his authority; and, 2ndly, that the contract whereon the action was founded was not capable of division, and therefore that the defendant was not liable to the extent of 100*l.*

DECLARATION in the ordinary form, and containing the customary averments, on a policy of insurance on the ship *City of Brisbane*, subscribed by the defendant for 150*l.*, claiming for a total loss.

Plea. Denial of the subscription of the policy.

At the trial before Lush, J., at the last Liverpool spring assizes, the following facts were proved:—The plaintiffs are shipowners at Liverpool, carrying on business under the style of James Baines & Company, and the defendant, who usually resides in England, is a partner in the firm of Ewing & Company, of Calcutta. In July, 1861, he gave an authority in the following form to Messrs. North, Ewing, & Company, of Liverpool, insurance brokers, to underwrite policies on his behalf:—

“I hereby authorize you, in my name, and on my behalf, to underwrite policies of insurance against marine risks not exceeding 100*l.* by any one vessel; and I authorize you to hold and return all premiums received for me as a fund to answer losses, it being understood that all accounts between us are to be settled according to the usual course of transacting business between underwriter and broker as customary in Liverpool, and separate deposit account kept with bank; also to reinsure risks and to adjust and sign off all losses, averages, or returns, and

to give the usual credit note and make payment of the same on my account; also to dispute any claims which you may consider illegal or unjust, and to settle the same by arbitration or otherwise. Accounts to be rendered half yearly."

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In pursuance of the authority thus given to them, and acting upon the ordinary rules of insurance business, the brokers laid Mr. Ewing's name before the Underwriters' Association of Liverpool, as the name of a person desirous of underwriting policies. The Association approved the defendant's name, which was thereupon entered upon their books; and the brokers commenced subscribing policies on various ships in his name according to the custom of the Liverpool trade, the custom being for brokers not to send policies to their principals, but to sign their principals' names to the policies. It is well known in Liverpool that in almost all cases, if not in all, a limit is put to the amount for which a broker can sign his principal's name, but the limit is a secret one, and remains undisclosed to the assured.

In October, 1862, whilst the authority given to North, Ewing, & Company, was still in force, that firm subscribed a policy on the *City of Brisbane*, a ship belonging to the plaintiffs, in the defendant's name, for 150*l.*, thus exceeding the limit fixed upon between the defendant and themselves by 50*l.* The plaintiffs did not know of the limit imposed on the brokers by the defendant, nor that it had been exceeded. The defendant, on learning what had been done, did not ratify the policy. The premium had remained throughout in the hands of the brokers. On several other occasions the brokers had subscribed for amounts beyond the limit, but never, either in this case or any other, to the knowledge of the defendant.

A total loss under the policy being admitted, a verdict was by arrangement entered for the plaintiffs for 150*l.*, and leave was reserved to set it aside and enter a nonsuit or verdict for the defendant, or to reduce the damages to 100*l.*, or any smaller sum.

In Easter Term last, *Edward James, Q.C.*, obtained a rule nisi, pursuant to leave reserved, on the ground that there was no evidence of authority given by the defendant to underwrite the policy.

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Brett, Q.C., and *Quain*, shewed cause. First, the defendant held out his brokers as general agents to underwrite policies, and the plaintiffs had a right to assume that the authority would be properly exercised in all matters within the scope of the brokers' employment. The brokers were not agents to underwrite one particular policy, but all policies they might in their discretion think proper to underwrite. They were therefore "general agents" for a particular purpose: *Story on Agency*, 4th ed. s. 126, *Smith on Mercantile Law*, 7th ed. p. 128; and no secret limitation of their authority could affect the rights of a third party to whom the limitation was unknown: *Story on Agency*, 4th ed. s. 127, n., *Duer on Marine Insurance*, vol. ii. lect. xii. ss. 49, 50.

[BRAMWELL, B. Apart from the existence of a custom at Liverpool to limit the authority of a broker, I should certainly have thought that there had been a holding out of these brokers by the defendant as his agents to underwrite policies without any particular limit.]

The custom does not alter the principle that a private limitation shall not prejudice third persons. Even without the existence of the custom, a person might be certain that there was *some* limit which the brokers would be bound not to transgress. The case is analogous to that of a factor who has a general authority to sell his principal's goods, but who is notoriously limited by private instructions not to sell for less than a particular sum. Suppose he transgresses these instructions, the buyer is not prejudiced.

[BRAMWELL, B. I should be disposed to doubt that proposition. Is there any authority for it?]

In *Story on Agency*, 4th ed. s. 131, it is said that if factors who possess a general authority to sell, violate their private instructions, the principal is none the less bound. The practical inconvenience of holding the contrary would be very great. In insurance business, for example, an underwriter would have to produce his authority to every person seeking to insure who could not otherwise be certain that the underwriter was acting within the proper limit.

Secondly. The plaintiffs are at least entitled to a verdict for 100*l*. Where an agent exceeds his authority after pursuing it

to a certain point, his principal is liable up to that point. In Co. Litt. 258 a, it is laid down that, "where a man doth that which he is authorized to do and more, then it is good for that which is warranted and void for the rest."

[The Court having intimated a clear opinion that the contract in this case was indivisible, and that the plaintiffs were entitled under it to recover all or nothing, the argument on the second point was not further pressed.]

Edward James, Q.C., Mellish, Q.C., and H. T. Holland, in support of the rule, were not called upon.

MARTIN, B. I am opinion that this rule should be made absolute. The contract declared on, was made by an agent for his principal, and it was therefore necessary to prove his authority. Now its terms are as follows: "I hereby authorize you, in my name and on my behalf to underwrite policies of insurance against marine risks not exceeding 100*l.* by any one vessel"; and that document is produced to prove the declaration which alleges that a policy was subscribed for 150*l.* If the case had stood there the agent would certainly have been unauthorized. But then it is said that we must hold him to have had authority because of the exigencies and course of business at Liverpool. It appears, however, that it was well known there that a limit is almost always, if not always, put to the amount for which a broker may underwrite. The limit in a particular case is known, it is true, only to the principal and the broker; but still every one has notice that there is a limit of some sort; and I think, therefore, it would be impossible to hold a person liable to an unlimited extent, or to an extent beyond the fixed limit.

BRAMWELL, B. I am of the same opinion. The actual terms of the authority cannot in this case be relied on, and the plaintiffs therefore have to rely on the fact of the defendant having, as it is alleged, held out the broker as his agent generally to sign policies. But in fact he only held him out as having the ordinary authority of a Liverpool broker, and when we ask what that authority is, the answer is unfavourable to the plaintiffs' claim. It is not necessary to consider what the result would be if there were no limitation notoriously fixed between the principal and the agent. With regard

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to the passage cited from Story on Agency, 4th ed. s. 131, the case there referred to by no means warrants the general proposition laid down, and I doubt exceedingly whether the principal of a factor would be liable in a case where the factor sold in spite of a particular authority to sell at a particular price. Then it is said that business could not be carried on if, before accepting a policy for a certain amount, the assured were always to insist on the agent underwriting it shewing his authority to sign for that amount. The answer to that objection is, that, as a rule, reliance may be placed on the honesty of the broker and the solvency of the principal. It is unusual in business transactions for agents to assume an authority they do not possess.

CHANNELL, B. I am of the same opinion. The material question for our decision is, whether the defendant is liable on this contract. If we look only at the express authority it not only does not confer, it even negatives, any authority to sign a policy for so much as 150*l*. But then it is said the authority was given to a "general" agent and cannot be limited by secret instructions as to amount. Now I agree that to be a general agent a man need not be an agent for all purposes. He may be a general agent for a special purpose, for example, an agent to sign all bills of exchange. But here it is well understood that there is some limit fixed beyond which a broker may not underwrite policies, and that being so, the broker is not, in my opinion, a general agent in the sense contended for. I think, therefore, the rule should be made absolute.

Rule absolute.

Attorneys for plaintiff: *Westall & Roberts.*

Attorneys for defendant: *Uptons, Johnson, & Upton.*

GIDDINGS AND ANOTHER v. PENNING.

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June 21.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Deed under s. 192—Reasonableness—Verification of Debts under penalty—Forfeiture of Debt.

A deed under the Bankruptcy Act, 1861, s. 192, absolutely releasing the debtor, empowered the trustees to require any creditor to verify his debt by solemn declaration; and provided that, in the event of any creditor, if in Great Britain or Ireland, failing to verify his debt for two calendar months after such requisition, he should lose all benefit under the deed, and his dividends should fall into the general estate for the benefit of creditors not making similar default :—

Held, that the provision as to forfeiture was unreasonable, and the deed therefore bad.

DECLARATION for goods sold.

Plea, setting out a deed under the Bankruptcy Act, 1861, s. 192, dated 24th November, 1864, and made between the defendant of the first part, trustees of the second part, and “the several persons whose names, or the names of whose firms are written in the schedule hereunder written, and whose seals, or the seals of individuals, members or member or agent of whose firms are affixed, being respectively creditors of the said debtor upon or against whom these presents should become valid, effectual, and binding by reason of the provisions of the Bankruptcy Act, 1861, as to trust deeds for the benefit of creditors, or otherwise howsoever, of the third part.” By the deed the debtor, after reciting that he had become liable to his creditors in divers sums of money, which sums or some part thereof were set opposite to their names respectively in the schedule, assigned all his property to the trustees upon trust to realize the same, and out of the proceeds, after payment of expenses, to pay rateably, administering the assets as in bankruptcy (except where the contrary was provided for), “to and amongst all the parties hereto of the third part, including themselves the said trustees and their partners (if any) so far as they may be creditors as aforesaid, and including *all the creditors* of the said debtor, the several debts and sums due to such creditors respectively.” The deed also provided that, “it shall be lawful for the said trustees, at the expense of the estate, to require the amount of any debt of any of the creditors to be

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verified by solemn declaration; and in the event of any such creditors, if in Great Britain or Ireland, failing so to verify such debt for two calendar months after such requisition, such creditors or creditor shall lose all benefit, dividends, and advantage to be derived from these presents, and thereupon such last mentioned dividends shall fall into the general estate for the benefit of the creditors not making similar default." There was an absolute release of the debtor by "all the said creditors"; and it was declared that the deed was meant to be binding on non-executing creditors under the Bankruptcy Act, 1861.

Replication, that the plaintiffs never executed or assented, or became parties to the indenture in the plea mentioned, nor were they, or their firm, or any agent of theirs, or their debt, named or mentioned in the schedule to the deed.

Demurrer and joinder.

June 4. *J. M. Howard* (*Abbott* with him), in support of the demurrer. The objections made to the deed will be two, first, that it does not provide for all the creditors; second, that the clause providing for the forfeiture of debts in default of verification is unreasonable. But the objections are untenable. First, the true construction of the words describing the parties of the third part, will make them include all creditors who would be bound by a valid deed under s. 192; the words "or otherwise howsoever," are surplusage. The trust for creditors also specifically purports to be for *all the creditors*, and it is under this trust that the whole benefit of the deed is to be derived. Second, as to the clause requiring a verification of debts, a provision in a somewhat similar form occurred and was disallowed in *Leigh v. Pendlebury* (1); but in *Coles v. Turner* (2), although *Leigh v. Pendlebury* was not expressly overruled, it was held that a provision that the creditor shall prove his debt by statutory declaration or otherwise as the trustee may think fit, was reasonable. It is true that no penalty was imposed there, but if it is established that verification may be required, it must be allowable to fix some time within which the proof must be made, so as to permit of the debtor getting

(1) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.

(2) Law Rep. 1 C. P. 373.

his discharge; and to make the provision effective, it is necessary to affix some penalties to non-performance of the condition. The only question therefore is, whether the time and the penalty are reasonable, and it is submitted that they are.

[POLLOCK, C.B. The rule can only be reasonable if it is reasonable in every case. No provision is made for cases of accidental omission, or of incapacity to prove; and while the creditors within the United Kingdom are barred, there is no limit fixed to the proof of creditors resident abroad. I doubt, moreover, the power of the majority of creditors to impose a penalty on non-compliance with the terms of the deed.]

Failing to verify may be taken to mean failing to verify without reasonable excuse; and *Scott v. Berry* (1) shews that, if you do the best you can for all the creditors, the deed is not bad because you do more for some than for others.

Macnamara, for the plaintiff. First, the deed is unequal. As to assenting creditors, the debtor admits them to be creditors for the sums set against their names in the schedule; non-assenting creditors must prove their debts.

[MARTIN, B. The trustees are trustees for all the creditors, and as to any of them they may require proof, not on behalf of the debtor only, but on behalf of the rest of the creditors.]

The forfeiture of the debt is unreasonable; no such penalty is attached to neglect to prove in bankruptcy, where the creditor may come in and prove at any time, not disturbing previous dividends.

[MARTIN, B. It was a common provision in the old composition deeds; see Forsyth on Comp. Deeds, 1st ed. p. 175. (2)]

(1) 3 H. & C. 966; 34 L. J. (Ex.) 193.

(2) The 'clause is as follows:—"It is hereby further agreed and declared between and by the said parties to these presents, that any of them, the said several persons, parties hereto of the third part, shall and will at any time, if called upon so to do by the said E. F. and G. H. (the trustees), or the survivor of them, or the executors or administrators of such survivor,

make a solemn declaration before a magistrate or master in chancery of the truth and justice of the debt claimed by them respectively, or their or any of their partner or partners, before he or they shall be entitled to claim any dividend or benefit under these presents in respect of such debt; and that in the event of any such person, after being so called upon, refusing or neglecting to make such declaration as aforesaid, such person shall lose all dividends,

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Those deeds, however, were only binding on persons who signed; here the provision is to bind third parties, and the plaintiffs are in that position. The provision as to proof is itself unequal, as favouring creditors resident abroad; and it is further unequal, inasmuch as the trustees are themselves creditors, and whilst they are able to dispense with verification of their own debts, they have a motive to require every other creditor to verify. But it is fatal to the deed that this provision, objectionable in itself, is enforced by a penalty; the authority of *Leigh v. Pendlebury* (1) is against such a penal clause; and in *Coles v. Turner* (2) the Court of Exchequer Chamber carefully avoids impeaching the decision on that point, although it allows the clause requiring verification as reasonable. Secondly, the deed is unequal, because its benefits are confined to those who execute it; they alone can sue on the covenants: *Davis v. Raphael*. (3) He also cited *Lyne v. Wyatt*. (4)

[MARTIN, B. The scope of the deed is the distribution of the property assigned.]

CHANNELL, B. If the deed is not to be read as providing for all the creditors, then the words "all the said creditors" in the release do not include the plaintiffs.]

J. M. Howard, in reply.

The Court intimated that they thought the deed was for the benefit of all the creditors; as to the other point,

Cur. adv. vult.

June 12. The following judgments were delivered:

CHANNELL, B. Upon the demurrer in this case the question for us was, whether the deed set up by the plea was valid under the Bankruptcy Act, 1861. It was sought to invalidate it on the ground that it contained a clause, whereby the trustees might require a creditor to verify his debt within a certain time by

benefit, and advantage to be derived from, or otherwise claimed under, these presents, anything herein contained to the contrary notwithstanding." Forsyth on Composition Deeds, 1st edition, (1841), p. 175. There is a similar clause as to referring disputed debts to arbitration (p. 189), which is retained

in the edition of 1856 (3rd edition, p. 262).

(1) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.

(2) Law Rep. 1 C. P. 373.

(3) 11 Jur. (N.S.) 140.

(4) 18 C. B. (N.S.) 593; 34 L. J. (C.P.) 179.

solemn declaration, under pain of otherwise forfeiting the composition on it provided by the deed. The stipulation in the deed involves two matters; first, what a creditor is to do; second, the consequence of his not doing it. As to the first matter, I think it is not unreasonable to require from a creditor a solemn declaration, which may be taken as a substitute for the affidavit required in bankruptcy; the trustees would have no right to object to its sufficiency, if it is good in point of form. But the deed goes on to provide that, unless a creditor makes this declaration within the time specified, he is to lose all the benefit he would otherwise have obtained under the deed. This amounts to an express provision that his debt is to that extent to be forfeited; and in my opinion such a provision is unreasonable, and therefore makes the deed not binding on non-assenting creditors, amongst whom are the plaintiffs.

BRAMWELL, B. I am of the same opinion, and for the same reasons.

MARTIN, B. I am not prepared to agree with the rest of the Court. I find that this very clause was a common one in old composition deeds, of which forms are given in the appendix to Forsyth on Composition Deeds; and but for the decisions which have been arrived at on deeds under the Bankruptcy Act, 1861, s. 192, and the opinions expressed, especially by Lord Chancellor Westbury, on that section, I should have thought the clause reasonable.

POLLOCK, C.B. I agree with my Brothers Bramwell and Channell. There is nothing in the statute to justify the introduction of a clause providing that a debtor who fails to verify his debt within a certain time shall forfeit it, and it is in my opinion unreasonable. With regard to the deed referred to by my Brother Martin, I would point out that it bound none but actual parties to it, and that in such a deed a clause similar to the present one might well be held reasonable; but the same rule cannot be applied to a deed entered into under a statutory power, and which aims at producing the effect of a bankruptcy by an arrangement, made between the debtor and a portion of his creditors, but binding on the whole. On this ground I adhere to the opinion I expressed during the argument; but I must add that the case of

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Coles v. Turner (1) is an authority supporting the same view of the question. In delivering the judgment of the Court of Exchequer Chamber, Blackburn, J., says (2): "We base our decision on this, that we think the clause now in question has not the effect of depriving the creditor, who fails to produce proof to the satisfaction of the trustee, of all benefit under the deed, and that we think the clause, as we construe it, quite reasonable." In my judgment the conclusion follows, that if the deed had had the effect of depriving the creditor, who failed to produce proof to the satisfaction of the trustee, of all benefit under the deed, the Court of Exchequer Chamber would have held it to be unreasonable. The learned judge further says: "It will be found that the provision in this deed perhaps requires no more from the creditor than would be required if the deed were silent—at all events requires nothing unreasonably beyond what would be thus required. It does not make the trustee an arbitrator finally to decide whether there is any debt, or what is the amount of that debt; *nor does it impose any penalty* on the creditors who fail to produce what the trustee thinks sufficient proof of the debt." If the deed had imposed a penalty, if it had contained a clause of forfeiture, the Exchequer Chamber would, it should seem, have held the deed bad. I am therefore of opinion that this deed, which is to bind as well non-assenting as assenting creditors, is unreasonable on account of its containing this provision as to forfeiture.

Judgment for the plaintiff.

Attorney for plaintiff: *E. Doyle.*

Attorney for defendant: *J. J. Rae.*

(1) Law Rep. 1 C. P. 373.

(2) At pp. 379, 380.

[IN THE EXCHEQUER CHAMBER.]

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June 18.

SMITH AND ANOTHER *v.* RIDGWAY.*Will—Construction—Appurtenances.*

The testator was seised in fee of two manufactories at H., one on the east, and the other on the west side of the High Street. The latter was worth one half as much again as the former. They had for the last thirty years been occupied and used together at a single rent as an earthenware manufactory, and they were at the date of the devise and of the testator's death so used and occupied by R. and A. They had formerly, however, been used separately, and with some alterations were capable of being so used again. By his will, the testator devised all his real estate to trustees for sale, and, by a codicil, devised his "messuages, manufactory, &c., on the west side of High Street, in the occupation of R. and A. and others, . . . together with all rights, members, and appurtenances to them belonging or appertaining," to A. and W. :—

Held, that the manufactory on the east side did not pass under the devise to A. and W.

APPEAL from the judgment of the Court of Exchequer, discharging a rule to enter a nonsuit. (1)

The question arose upon the construction of the will and codicil of Joseph Mayer. By his will, dated 23rd April, 1860, he devised all his real estate to the plaintiffs upon trust for sale; by a codicil, dated 26th June, 1860, he devised as follows:—"I give and devise my messuages, cottages, manufactory, and land, on the west side of High Street, in Hanley aforesaid, in the occupation of Ridgway and Abingdon and others, my messuage on the east side of High Street, in Hanley aforesaid, in the occupation of Mrs. Ridgway, my messuage on the east side of Hanley aforesaid, in the occupation of Mrs. Adams (2), and my five messuages or cottages at the corner of Broom Street, Hanley, aforesaid, in the occupation of William Chesters and others, all which said messuages, lands, hereditaments, and premises are situate in the parish of Stoke-upon-Trent aforesaid, together with the stables, warehouses, outbuildings, yards, gardens, and all other rights, members, and appurtenances to the said messuages or tenements, lands and hereditaments, belonging or appertaining,

(1) Reported ante, p. 46.

the following premises, were also on the

(2) It appeared that these as well as *east side of High Street.*

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unto my friends, Leonard James Abington and Abner Wedgwood, of the parish of Stoke-upon-Trent, absolutely as tenants in common.”

The testator also owned a manufactory on the *east* side of High Street, which was occupied and used with that on the west side; this was claimed by the devisees under the codicil as appurtenant to the latter, but the Court below were of opinion that it did not so pass to them.

From this decision the defendant appealed.

Terrell (*Quain* with him), for the defendant, in support of the more extended construction of the word “manufactory,” cited *Steele v. Midland Railway Company* (1), and the comment there (2) by Turner, L.J., on the case of *Doe v. Collins* (3); and *Bodenham v. Pritchard*. (4)

Milward, Q.C. (*Baylis* with him), for the plaintiffs, cited *Webber v. Stanley* (5), as establishing the proposition, that where there is a subject matter to which the whole description exactly applies, no part of the description can be rejected.

The arguments on each side were in substance the same as those used in the court below. (6)

WILLES, J. We are all of opinion that the judgment must be affirmed. The question for our decision is, whether the words in the devise, “on the west side of High Street,” ought to be rejected as a *falsa demonstratio*, or whether they are true words of restriction upon the general terms of the devise in which they are inserted. It is unnecessary to enter into an examination of the authorities, for they are consistent, from the time of Lord Bacon to the decision in the case of *Webber v. Stanley* (5), where Erle, C.J., laid down the law with a clearness and authority which cannot be strengthened or added to. The rule which they establish is, that where words can be applied so as to operate on a subject matter and limit the other terms employed in its description, or in other words, where there is a subject matter to which

(1) Law Rep. 1 Ch. Ap. 275.

(2) At p. 291.

(3) 2 T. R. 498.

(4) 1 B. & C. 350.

(5) 16 C. B. (N.S.) 698, 752; 33

L. J. (C.P.) 217.

(6) Ante, p. 49.

they all apply, it is not possible to reject any of those terms as a falsa demonstratio. This is expressed in Lord Bacon's maxim, "non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram." The question, therefore, is, whether, looking at all the words employed, they are satisfied by a complete description of the property on the west side of High Street, or whether, in order to satisfy the language taken altogether, it is reasonable to say that the property on the east side passes also, and that the words of limitation must be rejected. The result of the evidence is, that there was on the east side a factory of an old-fashioned kind, which was formerly used as a distinct manufactory; that, in the state in which it was in 1860, it could not be so used without work being done to set it to rights, but that with some alteration and repair it was capable of being again used as a distinct manufactory. Both factories were taken together under a lease in 1830, and have since been held together. It seems that the one on the east side was formerly of equal importance with the other, but that, in consequence of various improvements, the manufactory on the west side afterwards became the more important one, the principal processes were carried on there, and that on the east side was used more or less as subsidiary to it. Here then there was at the time of the devise, and of the testator's death, a manufactory on the west side, answering the description in his will, and another on the east side within some, but not within all, the terms of the description. The reason relied on to induce us to reject those words of the testator, which, though apt to describe the one, are inapplicable to the other, was, that in the will the term manufactory was used, not alone, but in composition with general language, sufficiently extensive to include all that was necessary for conducting the business of the manufacture as it was then carried on, and in a condition in which the use of the one building was essential to the use of the other. The general words "used therewith," which are often inserted to take in any small members of the property that may have been omitted in the previous specific description, are not found in this will; but it is insisted that the manufactory on the east side ought to pass as "belonging or appertaining" to the manufactory on the west side. No doubt words *primâ facie* describing only a building may be

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construed to include land so intimately connected with the use of the building that without it the building would be useless, as in the cases collected in *Steele v. Midland Railway Company* (1), and in the notes to *Smith v. Martin*. (2) It may be further admitted that "manufactory" is a larger and vaguer term than "house," and that it may include, not only the place where the machinery works, but outbuildings, as drying houses, or even land used in the course of the manufacture, as for instance bleaching grounds. But here the difficulty is, that what is sought to be included is not a mere accessory to the factory with which it is said to pass, but is at some distance from it, and is capable of being itself used as a manufactory. It may be observed further, that between the description of the manufactory, and the general words relied upon, there is inserted a devise of property also lying on the east side, and which is, like the manufactory, described by reference to its locality. Lastly, the defendant's contention is not assisted here by the argument which (whether valid or not) is often resorted to, that there is apparent on the face of the will, an intention on the part of the testator to dispose of the whole of his property; for the result of our holding that the manufactory on the west side alone passes, is not that the testator is intestate as to that on the east side, but that it goes under the will to the trustees on trust for sale. On the question, therefore, whether the words "on the west side of High Street" are a falsa demonstratio of what is otherwise sufficiently described, or a true restriction of the terms of the devise, we must hold that they are a true restriction; and the judgment of the Court below is therefore affirmed.

BYLES, BLACKBURN, MELLOR, and SHEE, JJ. concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Gregory & Rowcliffes*.

Attorneys for defendant: *Raw & Gurney*.

(1) Law Rep. 1 Ch. Ap. 275.

(2) 2 Wms. Saund. 401.

[IN THE EXCHEQUER CHAMBER.]

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June 18.

REDPATH *v.* WIGG AND ANOTHER.

Principal and Agent—Debtor and Creditor—Inspectorship Deed under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192.

A trader, carrying on business as C. J. M. & Co., ordered goods of the plaintiff, and before their delivery executed an inspectorship deed, of which the defendants were inspectors. The plaintiff afterwards wrote a note, addressed to the debtor, informing him that the goods were ready for delivery, and the defendants replied, requesting him to send the goods, and signing “for C. J. M. & Co.” The plaintiff sent the goods, and default being made in payment, sued the defendants for the price.

The inspectorship deed gave the debtor licence to carry on his business for six months under the control of the inspectors, who had power to put an end to the deed. The inspectors were to receive all the proceeds, pay current expenses (including salaries, rent, and plant and materials for the purposes of the business), and out of the surplus pay dividends to the creditors. They took no share of the profits, and had no power to take the management of the business to the exclusion of the debtor:—

Held, that the defendants having expressly signed the order “for C. J. M. & Co.” they could only be liable as the real principals for the time being; that the deed did not constitute them the masters or real principals of the debtor in carrying on the business; and that, consequently on the above facts, there was no evidence to go to the jury of their liability. The plaintiff could only look for payment to the firm of “C. J. M. & Co.,” and to the trust in the deed for the payment of current expenses.

ERROR on a bill of exceptions to the ruling of Martin, B., on the trial of this cause at the London sittings after Hilary Term, 1866.

This was an action for goods sold, brought against the inspectors of the estate of C. J. Mare, who had traded as a shipbuilder in the name of C. J. Mare & Co. The goods in question were, before the inspectorship deed, ordered of the plaintiff, an iron-founder trading under the name of Redpath & Leigh, by an order dated the 9th December, 1864, signed by a clerk of Mare’s “for C. J. Mare & Co.,” and inclosed in a letter dated the 12th December, and similarly signed. Before the goods were ready for delivery Mare stopped payment, and on the 3rd January, 1865, he executed an inspectorship deed under the Bankruptcy Act, 1861, under which the defendants were inspectors. On the 1st February, the plaintiff sent a letter, addressed to C. J. Mare & Co., giving notice

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that the goods were ready for delivery, and on the 6th February the plaintiff received from the defendants a note in these words:

“Northfleet Dockyard, 3rd February, 1865.—No. 291.

Messrs. Redpath & Leigh,

Please send three of Redpath's patent iron pumps, No. 4 size, two Fire Hearths (one for natives of India).

(Signed) George Wigg, J. Lyster O'Beirne,

For C. J. Mare & Co.”

These were the same goods previously ordered, and they were, on the 13th February, delivered at Mare's place of business, with an invoice made out to “The Inspectorship Trustees of the estate of C. J. Mare & Co.” On the 28th February, the invoice was sent back with a note, signed by a clerk “*for C. J. Mare & Co.,*” requesting that it might be altered and made out to “C. J. Mare & Co.” This alteration was accordingly made by a clerk of the plaintiffs, and the invoice so altered was returned, but this was done without the plaintiff's authority.

These facts having been proved at the trial, the counsel for the defendants objected that there was no evidence to go to the jury of the liability of the defendants, but the learned Baron ruled that there was evidence; and the jury having found a verdict for the plaintiff, the defendants tendered this bill of exceptions.

The deed was made between C. J. Mare, of the first part, George Wigg and William Green (for whom J. Lyster O'Beirne was afterwards, under a power in the deed, substituted by G. Wigg), as inspectors of the second part, and the creditors of C. J. Mare of the third part.

By it the creditors granted to the debtor absolute liberty and licence to conduct, manage, and carry on his business as a shipbuilder, and to collect and dispose of all his real and personal estate, under the inspection, and subject to the approbation, direction, and control of the inspectors, for six months from the 1st January, 1865.

The debtor covenanted to make out accounts of his assets and liabilities; to use his best endeavours to carry on the business, subject to the direction, control, and advice of the inspectors; to collect and realize his property for the benefit of the creditors; not during the inspectorship to dispose of any of his property, or give

any preference to any of his creditors; to keep proper books of account, and to allow the inspectors to examine the same; not to engage in any new trade, or doubtful or uncertain contract, or become security for any one, or do anything which might hinder the inspection or liquidation contemplated by the deed; and the debtor appointed the inspectors his attorneys to sue for and recover his estate and effects, to sign his name, and to act for him generally in matters connected with the deed.

It was further provided, that the inspectors might employ, or authorize the debtor to employ, any persons as clerks, workmen, &c., to assist in carrying on the business, and might pay to them, or to the debtor for his services, out of the moneys in hand, such reasonable salaries, wages, or remuneration as they should think fit; that all the moneys which might come to the hands or under the control of the inspectors should (after payment of the costs of obtaining them), be applied by or under the direction of the inspectors, in the first place, in payment of the costs and expenses of the previous investigation of the debtor's affairs, and the execution, &c., of the deed; and in the second place, in the payment of the costs of carrying out the powers and provisions of the deed (including the payment of such salaries, &c., as aforesaid); and in the third place, in payment rateably of the debts due from Mare to the said creditors; and that all costs and expenses to be incurred in and about the carrying on of the business, whether for salaries or wages, or for rent or other outgoings in respect of the business premises, or for the purchase of plant or materials for the purposes of the business, or otherwise in respect of the business, should, in the first instance, be paid out of the moneys to be produced by the carrying on of the business, and subject thereto, out of any moneys which might come to the hands or under the control of the inspectors. It was further provided, that whenever the inspectors had money in their hands to the amount of 50*l.*, they should pay the same into a bank to their own account, which account should be drawn upon as they should direct; that they should, whenever the moneys in their hands were in their opinion sufficient for that purpose (after allowing for current expenses), pay dividends to the creditors, retaining a sufficient sum to pay like dividends to non-assenting creditors, and on unascertained debts; the inspectors had power to

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litigate and compromise claims by and against the debtor; to require the verification of debts; to pay, out of moneys in hand, the expenses of carrying out contracts in the way of the business already entered into by the debtor, or which he might during the continuance of the inspectorship enter into with the sanction of the inspectors, and to determine any such contract upon such terms as they might think fit, if they should be of opinion it would be for the benefit of the estate.

The inspectors had power to put an end to the deed on violation of its terms by the debtor; if at the end of six months the creditors were not paid, the debtor was to wind up the business under the inspectors' control, unless the creditors should in the meantime extend the period for the inspection and letter of licence for a further period of not more than six months; and if the creditors should pass a resolution accepting a composition, the provisions of the deed were to cease. The deed further contained a power to appoint new inspectors, a proviso that the inspectors' receipts should discharge, and a declaration that the deed was intended to operate as a deed of inspectorship under the Bankruptcy Act, 1861.

May 14. *J. C. Mathew*, for the defendant O'Beirne (1), contended that the defendants could only be liable as the real principals of Mare, and that the facts furnished no evidence that they were so; and referred to *Hart v. Alexander* (2); *Cox v. Hickman* (3); and *Bullen v. Sharp*. (4)

J. Brown, Q.C. (Barnard with him), for the plaintiff. The letter of the 3rd February, amounted to a fresh order, and in writing it the defendants acted as principals. If they had acted merely as inspectors, they should have used words to shew it, for example, by signing the letter as "approved" by them. The course which they took induced the plaintiff to send the goods, evidently in the belief that he was giving credit to the inspectors, as the invoice shews; and since their expressions are ambiguous, the words should be taken in the sense most favourable for third persons dealing with them.

J. C. Mathew, in reply.

Cur. adv. vult.

(1) *Garth* appeared for the defendant Wigg, but only one counsel was allowed to be heard.

(2) 2 M. & W. 484.

(3) 8 H. L. C. 268.

4) Law Rep. 1 C. P. 86.

June 18. The judgment of the Court (Willes, Byles, Blackburn, Keating, Shee, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. This was an action for goods sold and delivered, brought by the plaintiff, who carried on business as an ironfounder under the firm of Redpath & Leigh, against the inspectors of C. J. Mare, who carried on business as a shipbuilder under the firm of C. J. Mare & Co. The deed of inspectorship was dated the 3rd of January, 1865, and was intended to operate under the Bankruptcy Act, 1861.

The goods were ordered by Mare, and his order was accepted by the plaintiff before the deed; the stoppage of payment took place before they were ready for delivery. On the 1st of February, 1865, the plaintiff wrote to C. J. Mare & Co., stating that the goods were ready, and awaited further instructions as to delivery. On the 3rd of February, 1865, an order for delivery was sent to the plaintiff, signed by the defendants, as follows:

“Northfleet Dockyard, 3rd February, 1865.—No. 291.

Messrs. Redpath & Leigh,

Please send three of Redpath's patent iron pumps, &c., (describing the goods previously ordered).

(Signed) George Wigg, J. Lyster O'Beirne,
For C. J. Mare & Co.”

Upon this order being given, the goods were, on the 13th of February, 1865, sent in to Mare's place of business, together with an invoice, making the inspectors debtors. Whether this invoice came to their knowledge did not appear, and it was soon afterwards returned, with a request that C. J. Mare & Co. should be made the debtors instead of the inspectors. This required alteration was accordingly made by one of the plaintiff's clerks, and the invoice returned, but, as the plaintiff at the trial stated, without his knowledge; so that the invoice may be considered out of the case, and the question for our decision is, whether the order of the 3rd of February, and the supply of the goods thereunder, furnishes any evidence of liability on the part of the defendants.

Upon this it is first to be observed that there was no suggestion of fraud. The deed when put in appeared to be an ordinary

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transaction, the bona fides of which was not impeached. Nor was the action founded upon any misrepresentation as to authority from Mare to give the order in the name of C. J. Mare & Co. The order upon the face of it purported to be given by the defendants for a named principal, on whose behalf, and not for themselves, they professed to act. Had the order been signed, like the original one, by a clerk of C. J. Mare & Co., no liability could have been imposed upon such clerk except by shewing want of authority from the alleged principal. And the burden of proving such want of authority would have rested with the plaintiff. No such evidence was offered or suggested to exist in this case. The plaintiff, therefore, cannot rely upon any ostensible liability of the defendants, but must shew that the capacity which they actually filled was that of Mare's real principals, so as to be in substance themselves C. J. Mare & Co. for the time.

This question, whether the inspectors are to be considered as principal traders, and the debtor only a servant or agent of theirs, is one of great and general importance, so far as we are aware, quite novel, and one the decision of which in the affirmative may seriously interfere with arrangements under inspectorship, inasmuch as it must needs deter responsible persons from undertaking the office. It would of course be possible to suppose a case in which the debtor became by the arrangement a mere servant, acting only for the benefit of others, or in which the business was intended to be carried on at the expense of new creditors who might be deceived into giving credit to the debtor, but really for the advantage of the old ones. Such a case, should it arise, will admit of an easy solution as one of fraud.

On the other hand, there may be a good business with a temporary embarrassment, where the intention is to keep together the debtor's business in his name (which may be an important element in its value), and for his permanent benefit as well as for the temporary benefit of his creditors; where with that view a letter of licence is granted, enabling him to carry on the business and to retain it for himself after he has paid his creditors, but the creditors stipulate that, until the debts are discharged, the business shall be carried on under the inspection and control of persons appointed by them, who shall receive the proceeds, pay

the current expenses of the business, and distribute the surplus; in such a case the object seems to be to maintain the debtor in the same position as he previously occupied, as the person principally interested in the business; and it seems no more reasonable to hold the inspectors liable, as being his masters, than it would be to say that a confidential clerk, to whose opinion his employer habitually deferred, or to whom he entrusts the entire conduct of the business, is as to third persons the principal.

The difference between such a case and the present is, that there the principal might resume the control at any time, whereas in the case before us, Mare could only do so upon payment of the debts, or a composition agreed to by a majority of the creditors, or by breaking his contract to submit to inspection, which he might do if he thought proper, at the risk of damages and loss of the benefit of the deed. But the cases put by way of illustration clearly shew that the mere fact of inspecting and controlling another person's business does not involve responsibility for debts contracted therein by him or in his name; and as for this contract, it cannot in favour of third parties create such responsibility unless it makes the inspectors the real principals.

In order to ascertain the precise position which the defendants occupied, it will therefore be proper to refer to the terms of this deed. [The learned judge then stated the effect of the deed as set out above, and continued:] It thus appears that the intention of the parties was, instead of pressing Mare for immediate payment or liquidation, to allow him to continue his business in such a manner, if possible, that after paying off his creditors he should have the option of going on for himself; that the business was to remain his, subject to his clearing off his debts; that the inspectors were to advise and control him, to receive the proceeds of the business, and after paying current expenses (including such debts as the plaintiff's), and not before, to divide the surplus amongst his old creditors. They were not to have any share of the profits, and were only to receive their actual costs and expenses. The deed contains no power to the inspectors to take the management of the business to the exclusion of Mare; so that they could not dismiss him, as a master or principal might his servant or agent.

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Under these circumstances, we think it cannot be maintained that these inspectors became Mare's masters or principals in the business, or liable as such for debts incurred by Mare & Co.

Nor can the plaintiff justly complain of this result. The form of the order gave him notice that Mare & Co. were his customers, and to that firm, and to the trust for payment of current expenses, he must be content to look.

The direction of the learned judge, that under the above circumstances there was evidence of liability on the part of the defendants, was therefore erroneous, and a trial *de novo* must be awarded.

Venire de novo.

Attorney for plaintiff: *C. E. Strong.*

Attorneys for defendants: *Young, Jones, Roberts, & Hall.*

June 19.

[IN THE EXCHEQUER CHAMBER.]

REUSS AND ANOTHER v. PICKSLEY AND ANOTHER.

Agreement—Statute of Frauds (29 Car. 2, c. 3) section 4—Proposal in Writing—Parol acceptance.

A proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds.

Warner v. Willington, 3 Drew. 523: *Smith v. Neale*, 2 C. B. (N.S.) 67; 26 L. J. (C.P.) 143, confirmed.

APPEAL by the defendants against a judgment of the Court of Exchequer discharging a rule to enter a nonsuit or for a new trial on the ground of misdirection and that the damages were excessive.

Declaration: first count, that it was on the 8th September, 1864, agreed between the plaintiffs and the defendants that the defendants should retain and employ the plaintiffs as the agents of the defendants in Russia for ten years from that date, in and about the sale for the defendants in Russia of machinery by them manufactured in their business as engineers at Leigh, near Manchester; that the defendants should allow to the plaintiffs full discount for

cash on all orders received by the plaintiffs direct, and should hand over to the plaintiffs to be dealt with in the same way all orders the defendants should receive from Russia except those from Odessa, and that on all orders executed by the defendants from Russia except Odessa that might come through any other agents in Great Britain, the defendants should allow the plaintiffs a commission of 5*l.* per cent.; that the plaintiffs should confine themselves to the defendants for the sale of every description of machinery which the defendants manufacture and the plaintiffs should sell in Russia; that the plaintiffs should take charge of certain machines of the defendants in Hull intended for the Moscow exhibition and to be exhibited there by the defendants, and that the plaintiffs should pay all freight, &c., for the same until as many of such machines as possible were delivered in Moscow; that after the close of the exhibition as many as remained unsold should be at the risk of the defendants, and that the plaintiffs should pay cash for all machines sold during the exhibition, the price to be calculated [in a manner in the declaration specified]. And all things happened &c., yet the defendants would not allow the plaintiffs full discount for cash, nor hand over to the plaintiffs to be dealt with the several orders received from Russia except from Odessa, nor pay the commission agreed on on orders through agents in Great Britain. And although the plaintiffs were willing to continue such agency as aforesaid, the defendants wrongfully and before the expiration of ten years dismissed them, whereby the plaintiffs have been injured.

Second count, that it was agreed between the plaintiffs and the defendants as in the first count mentioned, that the plaintiffs thereupon became the defendants' agents, and during the continuance of the agency in the first count mentioned the defendants voluntarily put an end to their business by transferring it to a joint stock company, and thus precluded themselves from carrying on the said business and thereby put an end to the said agency, although the plaintiffs were ready and willing to continue the same, whereby &c.

The defendants, amongst other pleas, as to the first count denied the agreement therein alleged, and as to the second count denied that the plaintiffs became their agents as therein alleged.

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The cause was tried at the Manchester winter assizes before Pigott, B., when the following facts were proved:—At the time of the alleged agreement the plaintiffs carried on business at Manchester, and the defendants carried on business as agricultural implement makers, at Leigh near Manchester, under the style of Picksley, Sims, and Co. In the autumn of 1864 an industrial exhibition was fixed to be held at Moscow, and the defendants were desirous of exhibiting some of their machines there. Accordingly they entered into negotiations with the plaintiffs, with the view of the plaintiffs undertaking to look after the goods sent by the defendants whilst at the exhibition. The plaintiffs at first declined the responsibility, but upon the defendants proposing to make an agency for ten years with them if they would bear a part of the expense of the exhibition, one of the plaintiffs, Mr. Ernst Reuss, stated that he would go to Moscow and himself superintend the arrangements necessary for exhibiting the defendants' goods. With that intention he went to Moscow in July, 1864, and remained there for a month. Meantime a quantity of goods were sent by the defendants to the plaintiffs for the purpose of being forwarded to the exhibition. On Mr. Reuss's return he requested an interview with Mr. Sims, one of the defendants, with reference to the Russian agency. An interview thereupon was had at which the terms of the agency were discussed, and afterwards the plaintiffs wrote to the defendants the following letter:—

“Manchester, 8th September, 1864.

Messrs. Picksley, Sims, & Co., Leigh.

Referring to our conversation with Mr. Sims, respecting the machinery for the Moscow exhibition, it was arranged that we take charge of all the machines &c., in Hull, and pay for your account all freight charges, insurances &c., till delivered in Moscow. That we sell in Moscow as many of the machines as possible, and that after the close of the exhibition the unsold remainder be at your risk and expense, either to keep in Moscow or return home as you think fit at your expense. That we pay you here cash for all machines sold during the exhibition, the price to be calculated at list price less the full trade discount for cash, that you pay the travelling expenses there and back of Mr. Smith, but that we pay his additional salary whilst in Moscow of 10s. per day, and his

hotel bill. That the agency for Russia be for ten years from date on following conditions. You to allow us full discount for cash on all orders received by us direct, and that you hand over to us to be dealt with in the same way all orders you receive from Russia (excepting those from Odessa). On all orders executed by you from Russia, excepting Odessa, that may come through any other agent in Great Britain, you allow us a commission of 5% per cent. That we act as and are hereby appointed your sole agents for the kingdom of Italy on the same conditions as for Russia. Awaiting your reply we are &c.,

Ernst Reuss & Co."

To that letter the defendants replied as follows:

"Bedford Foundry, Leigh, Lancashire,

September 9th, 1864.

Our Mr. Sims desires me to acknowledge the receipt of your favour dated the 8th inst., and to say as far as the agency for Russia goes he considers it satisfactory, except that you must confine yourselves to us for every description of machinery we manufacture, and which you sell in Russia. With respect to Italy, Mr. Sims, cannot at present say anything about it, in consequence of the change which is likely to take place in our firm shortly.—I am, &c.

p.p. Picksley, Sims, & Co., Joseph Smith.

Messrs. Ernst Reuss & Co."

The plaintiffs sent no reply to this letter, but after the date of it goods were sent to them by the defendants, and were forwarded by the plaintiffs to Moscow, where they were shown at the exhibition, which took place on the 7th September, 1864. At the close of the exhibition a great proportion of the goods remained unsold, and in respect of these, as well as in respect of those sold, the plaintiffs incurred considerable expenses.

On the 8th December, 1864, the defendants transferred their business to a Joint Stock Company, and in the February following, the plaintiffs' Moscow agent died. Shortly afterwards the plaintiffs and defendants entered into a correspondence with a view to a settlement of the matters connected with the Moscow exhibition, but the parties were unable to come to any agreement. The plaintiffs thereupon brought this action. No orders for machinery from

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England had been received by either plaintiffs or defendants for Russia (except Odessa), at the time of the alleged breach.

Upon the trial the learned judge directed the jury that the Moscow and Russian stipulations in the letters of the 8th and 9th September were parts of one and the same contract, and the jury found that the plaintiffs did accept and accede to the terms of that contract. A verdict was accordingly entered under the direction of the learned judge for the plaintiffs, damages 850*l.* Leave was reserved to the defendants to move to set aside the verdict and enter a nonsuit on the ground that there was no sufficient memorandum in writing of the contract under the Statute of Frauds (29 Car. 2, c. 3), s. 4, which enacts, amongst other things, that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith, or his agent. A rule nisi was obtained in Hilary Term last pursuant to leave reserved, and also for a new trial, on the ground of misdirection by the judge in ruling that the Moscow and Russian stipulations were one contract, and of the damages being excessive. The Court (Feb. 8) discharged this rule (the plaintiffs consenting to reduce the damages to 650*l.*), holding themselves bound by the authority of *Smith v. Neale*. (1) Pollock, C.B., however, stated that had the question been *res integra* he should have been disposed to come to a contrary conclusion. Against this decision the defendants appealed, and the question for the opinion of the Court was, whether the defendants were entitled to have the verdict found for the plaintiffs set aside, and a nonsuit entered.

Brett, Q.C. (*Hayman* with him), for the defendants. There is no evidence of an assent by the plaintiffs sufficient to bind the defendants to the terms of the contract or contracts contained in the letters of the 8th and 9th September. In *Warner v. Wilington* (2), Kindersley, V.C., says that for "an act to constitute a sufficient acceptance of a written proposal, it must be an unambiguous act; and an acceptance of a written proposal

(1) 2 C. B. (N. S.) 67; 26 L. J. (C.P.) 143. (2) 3 Drew, at p. 533.

must be an unconditional acceptance." Now, the present case may be regarded in two ways; either the letter of the 9th may be regarded as an assent, with certain modifications, to the terms contained in the letter of the 8th, so as to constitute an entire contract, or else the two letters may be taken to constitute a proposal to which the plaintiffs assented by conduct without writing. As to the first alternative, the letter of the 9th was not an assent but a counter-proposal. The letter of the 8th in reality contained the terms of three separate contracts, as to the Russian agency, as to the Moscow exhibition, and as to the Italian agency. Then the reply is silent as to the Moscow exhibition, modifies the terms suggested as to the Russian agency, and declines the Italian agency altogether. The acceptance, therefore, as far as this reply goes, was neither unequivocal nor unconditional. As to the second alternative, if the contracts ought to be considered as three and not one, the plaintiffs' conduct does not amount to an assent as far as the Russian agency is concerned. But granting that the two letters do contain a memorandum of a proposal signed by the party sought to be charged, that cannot be accepted by parol. *Warner v. Willington* (1), is an authority to the contrary, but with that exception there has been no case on the subject. Kindersley, V.C. (p. 532), says, "I cannot find any case in which it is determined that parol acceptance of a written proposal is sufficient."

[BLACKBURN, J., referred to *Colegrave v. Upcot* (2), cited in Sugden Vendors and Purchasers, 10th ed. vol. i. p. 164, as decisive of the point.]

The Vice-Chancellor could not have considered that case in point for it was cited in the argument before him. *Smith v. Neale* (3), on which the Court below acted, merely follows *Warner v. Willington*. (1) It is moreover not an express decision on this question though Willes, J., expresses an opinion in conformity with that of Kindersley, V.C. The *Liverpool Borough Bank v. Eccles* (4), also followed the same case.

[WILLES, J., referred to *Mozley v. Tinkler* (5), where Parke, B.,

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(1) 3 Drew, 523.

(2) 5 Vin. Abr. 527.

(3) 2 C. B. (N.S.) 37; 26 L. J. (C.P.) 143.

(4) 4 H. & N. 139.

(5) 1 C. M. & R. 692.

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indicates that a proposal in writing need not be accepted by writing.]

The principle of the sufficiency of a parol acceptance ought to be confined to a case where the writing assented to is in itself a memorandum of an agreement and not a mere offer. If it is the latter a subsequent acceptance without writing cannot be enough: it cannot turn a *proposal* into an agreement or memorandum sufficient to satisfy the Statute of Frauds. Kindersley, V.C. in the case already referred to recognises but does not act upon the distinction between a memorandum of agreement and of offer. "The one," he says (1), "supposes that the two parties have verbally made an actual contract with each other, and when the terms of such contract are reduced to writing and signed that is sufficient to bind the party signing, but if the memorandum is of an offer only, that assumes there has been no actual contract between the parties." This distinction is also recognised in the decisions on the Stamp Acts. A proposal accepted by parol requires no stamp, *i.e.*, it is not considered a memorandum of agreement.

Manisty, Q.C. (*Holker* and *Baylis* with him), for the plaintiffs. That the contract contained in the letters was one and not three-fold is sufficiently shewn from the negotiations which preceded it. As to the letters themselves they constitute an entire proposal, and the defendants must be taken to have approved of and adopted the terms from which they do not dissent. Then assuming the contract to be one, the authorities and dicta, from *Colegrave v. Upcot* (2) downwards, are all in favour of the proposition, that a written proposal signed by one party may be assented to without writing by the other.

Brett, Q.C., in reply.

The judgment of the Court (Willes, Byles, Blackburn, Mellor, Shee, and Montague Smith, JJ.) was delivered by

WILLES, J., who after referring to the pleadings, proceeded as follows:—We are all of opinion that the judgment of the Court of Exchequer should be affirmed. It appears that the plaintiffs, through a member of their firm, had some negotiations with the

(1) 3 Drew. at p. 531.

(2) 5 Vin. Abr. 527.

defendants, through a member of their firm, with reference to so much of the contract declared upon as related to the Moscow exhibition. In the course of these negotiations, the plaintiffs refused to encounter the expenses of this exhibition unless the defendants would undertake in some way or other to reimburse them, and accordingly communications as to the manner in which this object could be effected were entered into between the parties. It was suggested by the plaintiffs that they should be employed for a term of ten years as agents in Russia for the sale of machinery. But when first broached, that negotiation did not come to a head. One of the plaintiffs went abroad, and on his return sent word that he wished to see one of the defendants, Mr. Sims, on business, that business being with reference to the agency in Russia. An interview was thereupon had, at which the terms of the agency were discussed, and letters afterwards passed relating to the Moscow exhibition, the agency in Russia, and an agency which the plaintiffs desired in Italy. On the 8th September, 1864, one letter was written by the plaintiffs, and on the 9th an answer was sent by the defendants. The letter of the plaintiffs was to this effect. [The learned judge read so much of the letter as refers to the Moscow exhibition.] Then the letter proceeds to speak of the Russian agency in terms not applicable to a distinct or separate contract. Having dealt with the matters connected with the Moscow exhibition, which was to operate as accessory to the general agency, and as an advertisement, the letter goes on to detail the terms of the agency for Russia; and as to this part of the arrangement the plaintiffs do not state that they are to abstain from taking orders from other persons. To this, and to this alone, the defendants objected in the letter of the 9th. Then follows, in the letter of the 8th, the paragraph respecting the Italian agency.

In answer to this letter comes the letter of the 9th September. [The learned judge read the letter.] So far, therefore, as the Russian agency goes, the letter of the 8th was otherwise satisfactory to the defendants. Now, the letter of the 8th dealt with the Russian agency and also with the arrangement respecting the Moscow exhibition. There was no reference to the one as distinct from the other, and the conclusion is, that as to the Moscow exhibition no observation

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was required, and as to the Russian agency the sole objection was that the plaintiffs, instead of having the agency given to them without limitation, were to be prevented from being agents for any one else. As to the Italian agency, that is put out of the question. The meaning, therefore, of the whole is this:—"True we made a certain arrangement yesterday as to Russia, but we meant it to be with a limitation, and as to Italy we made no arrangement at all."

Now, this was either a memorandum of agreement, or at least a proposal with the terms of the letter of the 8th as a basis; a proposal, that is, that the plaintiffs should act as agents at Moscow, and become agents for Russia, pledging themselves to take no other agency. Therefore, I say these letters constitute either an agreement or at least a proposal. Assume it in favour of the defendants to be the latter.

We must now consider what followed. The Moscow exhibition took place, and the goods intended for exhibition were forwarded and dealt with by the plaintiffs as they undertook to deal with them. Expenses were incurred by the plaintiffs which they certainly would not have incurred without a promise of the Russian agency; and these expenses were incurred with reference to the Moscow exhibition. Was this evidence of assent on the part of the plaintiffs to the terms of the letter of the 9th September? The defendants maintain that it was not, and their argument depends on a dissection of the terms of the letter of the 8th. But we see no reason for dissevering those terms. The whole appears to have been one arrangement. When taking the two letters together we find the second silent as to the Moscow exhibition, and when we find moreover that the exhibition was accessory to and connected by way of advertisement with the rest of the Russian agency, we conclude that the whole transaction between the parties was one and indivisible. Therefore there was a performance of their part by the plaintiffs, which was evidence of an assent to the terms of the letters of the 8th and 9th September, or treating the letter of the 9th as a modified proposal, there was evidence that the plaintiffs assented to it.

Now in point of law what was the effect of this assent? Putting for the moment the Statute of Frauds out of the question,

no inquiry would be made as to the precise time at which the different parts of one single transaction took place. The question would be, was it or was it not one transaction, and was an assent contained in it; and in this case we are of opinion that the transaction was one, and did contain an assent. But the Statute of Frauds introduces a new element, because it makes it necessary by section 4 that an agreement not to be performed by either party within a year must be in writing, signed by the party to be charged therewith. Now all that was signed here was not a formal agreement but a proposal on one side, and there was an assent to that proposal on the other. All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th September, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to, does become a memorandum or note of an agreement within the 4th section of the statute.

Many cases might be put in illustration of this proposition, but one or two will be sufficient. Take for example a case arising under the Joint Stock Companies Act (19 & 20 Vict. c. 47), whereby it is provided that no person shall be deemed to have accepted any share in the company unless he testifies his acceptance by writing under his hand [Schedule Table B]. It was at first supposed that something must be done by the shareholder in writing after allotment, and that otherwise he would not be a shareholder because he proposed in writing to become one and to accept his shares upon allotment. But the Court of Common Pleas, when the case was brought before them, said that it was a mistake to suppose that under these circumstances there was no acceptance in writing. The true mode, they said, of regarding such a transaction was that it was from beginning to end one transaction, and accordingly they held that the acceptance was complete, and the statute satisfied by a proposal in writing to accept the shares, followed by an allotment. The Court there acted on a judgment

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delivered in the Court of Queen's Bench by my Brother Blackburn to the effect that the "acceptance" of goods to satisfy the Statute of Frauds, s. 17, may be prior to the actual delivery of them. (1) It is indeed quite a fallacy to suppose that because certain acts happen at different periods they cannot be so connected as to form one transaction. That was the ground of the Lord Keeper's decision in *Coleman v. Upcot* (2); where he held that an offer to sell an estate, made in writing and afterwards accepted by parol, bound as a contract. The principle of that case was recognised and assented to by Kindersley, V.C. in *Warner v. Willington* (3); he did not, however, treat it as precisely in point, probably on account of the note in Viner, stating that, in fact, there was an acceptance in writing. The judgment, however, was founded on the consideration that the parol acceptance was sufficient, and it is cited to support that position by Lord St. Leonards (*Sugden, Vendors and Purchasers*, 10th ed. vol. i. p. 164). The case of *Warner v. Willington* (3) was followed by the Court of Common Pleas in *Smith v. Neale* (4), and by the Court of Exchequer in *Liverpool Borough Bank v. Eccles*. (5)

So far as to agreements which must be mutual, but where the statute only requires the signature of the party to be charged. But we may usefully consider two classes of contracts. One class includes cases where a proposal is made which may or may not be acted on. The most ordinary example is a guarantee, which by section 4 of the statute must be in writing. The creditor may supply goods to the person whose credit is guaranteed or not as he pleases; but if he does supply them the surety is bound, except in cases like *Mozley v. Tinkler* (6) where on the true construction of the guarantee, which was in the form of a letter to the plaintiffs, it was held that notice of the plaintiffs' acceptance of it should have been given. But in that case it does not seem to have occurred to any of the Court that the acceptance need be in writing. Indeed the judg-

(1) The cases referred to are *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. (Q.B.), 261; and *The Bog Lead Mining Company v. Montague*, 10 C. B. (N.S.) 481; 30 L. J. (C.P.) 380.

(2) 5 Vin. Abr. 527.

(3) 3 Drew. 523.

(4) 2 C. B. (N.S.) 67; 26 L. J. (C.P.) 143.

(5) 4 H. & N. 139.

(6) 1 C. M. & R. 692.

ment of Lord Wensleydale (Parke, B.) rather points to the opposite conclusion. That case therefore is confirmatory of our decision that the whole evidence of an agreement need not be in writing, but only all the terms along with the signature of the party to be charged.

It has been urged upon us that this conclusion will lead to fraud and perjury, and to the very mischiefs the statute was passed to prevent. We do not concur in that view, because no one will be able to enforce an agreement of the sort we are now discussing, without proving that he did or was ready to do his part to entitle him to performance on the part of the other contracting party. Moreover, if good for anything, that argument is good to shew that a regular *agreement* or memorandum of it, signed by one party only, ought not to bind him. The reason we have given is a good answer to the argument, but that argument was also considered by the Court of Common Pleas in *Laythoarp v. Bryant* (1), where the Court held, in spite of a weighty dictum of Sir W. Grant in *Martin v. Mitchell* (2), that only the party to be charged need sign, the other party, however, at the same time being ready to fulfil his own part of the agreement before suing.

Again, take another case, viz., the case of a contract where both parties must sign, of which the most familiar example is an ordinary lease for years not under seal which, by the conjoint operation of sections 1 and 4 of the statute, must be in writing, signed by the parties making the same. I am referring for the moment to leases before the 7 & 8 Vict. c. 76, and the 8 & 9 Vict. c. 106, which enacted that leases required to be in writing by the Statute of Frauds shall thenceforth be under seal. Where such a lease was signed by the lessee only, he took no interest, and was not bound according to the principle laid down in *Soprani v. Skurro*. (3) Now, suppose the lessee were to sign before the lessor. Every argument which has been urged to shew that a subsequent act cannot turn what is not an agreement into an agreement would apply; but could any one seriously contend that it would make any difference whether the lessor or lessee signed a lease first? The law is clear upon the point. We are not to look at

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(1) 2 Bing. N. C. 735. (2) 2 Jac. & Walk. at p. 428. (3) Yelv. 18.

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the precise moment at which an assent is given, but at the entire transaction, and if the assent when given does make a contract, that is enough; for the proposal, though prior in time, is in fact a memorandum or note of the terms of that contract, signed by the party to be charged within the meaning of the statute.

The judgment of the Court below must therefore be affirmed. We all approve of the reasoning of Kindersley, V.C., in *Warner v. Willington* (1), who, after all, only restated an old proposition of law.

Judgment affirmed.

Attorneys for plaintiffs: *Gregory & Rowcliffes.*

Attorneys for defendants: *Underhill & Field.*

June 12.

BICKFORD v. DARCY AND BEACHEY.

Practice—Interrogatories—Tendency to Criminate—Bona fides.

In an action against D. and B., as attorneys and solicitors, for not investing in a proper manner certain moneys entrusted to them by the plaintiff, the plaintiff proposed to administer interrogatories to B., with a view of shewing that there was a partnership between him and the other defendant in the business of attorneys and solicitors. B. objected to the interrogatories on the ground that he had never been admitted as an attorney or solicitor, and that they might therefore tend to criminate him and expose him to an indictment under 6 & 7 Vict. c. 73, s. 2, for the misdemeanour of practising without a certificate.

The interrogatories were allowed, the Court considering that they were *bonâ fide* put to aid the action.

Baker v. Lane (2) modified and explained.

DECLARATION. First count, that in consideration that the plaintiff employed the defendants as attorneys and solicitors to invest certain moneys for her on mortgage, the defendants promised to invest the same in a proper manner; that they received the moneys for that purpose, but did not invest the same. Second count, for money payable for money received, &c.

The defendants, as to the first count, pleaded non assumpsit, and a traverse of the receipt of the moneys in pursuance of the alleged employment; and as to the second count, never indebted.

(1) 3 Drew. 523.

(2) 3 H. & C. 544; 34 L. J. (Ex.) 57.

The plaintiff applied to Pigott, B., at chambers, for leave to administer various interrogatories to the defendant Beachey, all of which had, on the face of them, the object of shewing that there was a partnership between the defendants in their business as attorneys and solicitors. The defendant Beachey objected to answer them, on the ground that he had never been admitted as an attorney or solicitor, and that the interrogatories therefore tended to criminate him by making him liable to an indictment under 6 & 7 Vict. c. 73, s. 2, for the misdemeanour of practising as an attorney or solicitor without a certificate. The learned judge, however, allowed them to be put. The first of them was as follows:—"Did you during the year 1857 and during the succeeding years down to July, 1865, or during any and which of such years, receive any and what share of the profits made in those years respectively in the business of attorneys and solicitors carried on by the firm of Darcy and Beachey at Newton Abbott, Devonshire?" The other interrogatories were similar in character, and inquired particularly as to the mode in which the profits were divided.

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Karslake, Q.C., having obtained a rule nisi calling on the plaintiff to shew cause why the order made by the learned judge at chambers should not be rescinded,

Coleridge, Q.C., and *H. T. Cole*, shewed cause, and contended that the objection was one which should be postponed until the questions were put to the defendant Beachey. He might, perhaps, be privileged from answering, but he had no right to object to the questions being put to him: *Bartlett v. Lewis* (1); *Osborn v. London Dock Company* (2); *Stern v. Sevastopulo* (3); *Simpson v. Carter*. (4)

[CHANNELL, B., referred to *Reg. v. Garbett*. (5)]

Karslake, Q.C., and *A. Wills*, in support of the rule, relied on *Baker v. Lane* (6), as shewing that questions tending to criminate ought not to be allowed.

(1) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230. (4) 6 H. & N. 751 n.; 30 L. J. (Ex.) 224 n.

(2) 10 Ex. 698.

(5) 2 C. & K. 474.

(3) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268.

(6) 3 H. & C. 544; 34 L. J. (Ex.) 57.

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[POLLOCK, C.B., pointed out that the gist of the present action was the non-investment of moneys, a branch of the business not necessarily of an attorney, but of a scrivener. It was therefore possible for the defendant to answer the interrogatories without criminating himself.]

The declaration charges the defendants with default "as attorneys and solicitors," and the interrogatories inquire into the circumstances of their partnership as such.

[POLLOCK, C.B. The words "as attorneys and solicitors" in the declaration are immaterial.]

At all events, these interrogatories *tended* to criminate.

POLLOCK, C.B. I am of opinion that this rule should be discharged. The case of *Baker v. Lane* (1) has been cited, where this Court disallowed certain interrogatories, and it is urged that, as to some of them at any rate, the ground of our decision was that they tended to criminate. But the true reason for our judgment in that case was, that we did not think the questions were *bonâ fide*. Now here I think that they are *bonâ fide*, and on that ground ought to be allowed.

MARTIN, B. I am of the same opinion. Mr. Coleridge has laid down the correct rule in these cases, and in Wigram on Discovery, 2nd ed. p. 80, it is stated in similar terms. The author says: "If a question involves a criminal charge, the plaintiff is not entitled to an answer to such a question." His expression is, "not entitled to an *answer*." In 1854, a power to enforce discovery was given to the Common Law Courts, and soon afterwards the case of *Osborn v. London Dock Company* (2), was heard in this court, when Alderson and Parke, BB., adopted the same rule, and the Court of Common Pleas have adopted it also. I may add that I consider that the question of whether or not interrogatories should be allowed, is a

(1) 3 H. & C. 544; 34 L. J. (Ex.) 57. 3 H. & C. at p. 553. "POLLOCK, C.B. In the case of *Baker v. Lane*, argued last term, where the question was, whether certain interrogatories which the plaintiff sought to administer ought to be allowed, the objection being made that some of them tended to shew that the defendant had committed a criminal

offence, we are of opinion that the interrogatories ought not to be allowed." It will be observed that although the principal objection taken to the interrogatories at the bar is restated, no reason for the decision of the Court is given.

(2) 10 Ex. 698.

different matter from one of discovery in equity, and I think that all questions which are put *malâ fide* ought to be struck out. In *Baker v. Lane* (1), I thought they were so put, and that they had an ulterior object beyond that of helping the suit. Now here the question at issue is, whether the defendant Beachey is jointly liable with Darcy; and I think none but *bonâ fide* questions are put to find out whether the two defendants were partners, not, be it observed, in the general business of attorney, but as scriveners. This rule should therefore be discharged.

CHANNELL, B. I am of the same opinion. If I thought these questions had an indirect object, besides that of assisting the action, my conclusion would be different. But their object seems to be simply to shew, first, that a particular firm was intrusted with the duty of investing the plaintiff's money, and secondly, that the defendant was a member of that firm. The business of investing money, moreover, is not necessarily incident to the profession of an attorney. Again, the authorities, as far as they go are in the plaintiff's favour. The case of *Osborn v. London Dock Company* (2), is in his favour; and so also is the case of *Bartlett v. Lewis* (3), and I do not think that *Baker v. Lane* (1), overrules the fair inference to be drawn from these cases.

Rule discharged.

Attorney for plaintiff: *T. Martin.*

Attorneys for defendant: *Church & Sons.*

(1) 3 H. & C. 544; 34 L. J. (Ex.) 57. (2) 10 Ex. 698.

(3) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.

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June 8.

WRIGHT v. CHILD.

Sheriff—Special bailiff—Execution—Writ of fi. fa.

A debtor, whose goods had been seized under a writ of fi. fa., persuaded the officer executing the writ not to advertise the sale, and himself interfered to prevent the issue of the bills; on the day of sale his agent induced the officer to postpone it to a later hour, and on the officer's proceeding to sell, directed him to sell also for a writ that day lodged with him, and under which he could not otherwise have then sold. In the management of the sale the officer conducted himself negligently in not properly lotting the goods, and they consequently sold at an undervalue:—

Held, that the above facts did not constitute the officer the agent of the execution debtor, so as to absolve the sheriff from liability for the officer's negligence in the conduct of the sale.

THIS was an action brought by the plaintiff, as assignee in bankruptcy of the estate of Joseph Outram, against the defendant, the sheriff of Staffordshire, for improper conduct by his officer in the execution of a writ of fi. fa. against the goods of the bankrupt, before bankruptcy.

Declaration. First count, that, before the bankruptcy of one Outram, a writ of fi. fa. was issued out of the Common Pleas against the goods of Outram, directed to the defendant, who was then the sheriff of Staffordshire, and indorsed for 163*l.*, with interest and costs (the 163*l.* being the amount recovered in an action brought against Outram by the Bank of England); that the writ so indorsed was delivered to the defendant as such sheriff, and that the defendant, before the bankruptcy, seized under the writ goods of Outram of a value more than sufficient to satisfy the writ, yet that, although the execution was upon a judgment recovered in an action for a debt over 50*l.*, the defendant wrongfully sold by auction the goods so seized, without advertisement on or during three days next preceding the day of sale, and wrongfully sold the goods for a price which was inadequate, and less than their reasonable price, and without taking due and reasonable care in advertising and giving notice of the sale, and without giving due and sufficient notice thereof; and also conducted himself negligently in the conduct and management of the sale, and wrongfully converted to his own use a great part of the goods, and of the

proceeds of the sale; and that by reason of the premises the sale realized much less than it otherwise would have done, and the plaintiff, as assignee, was deprived of a great part of the bankrupt's estate and effects.

Second, third, and fourth counts: similar to the first, except that they related respectively to writs for 189*l.*, 43*l.*, and 16*l.*, issued in other actions against the debtor, and except that the two last, which related to writs issued in actions for debts under 50*l.*, omitted the charge of negligence in selling within three days.

Fifth count, after stating that the writs mentioned in the preceding counts, so directed and indorsed, were delivered to the defendant as such sheriff, for the purposes in those counts mentioned, alleged in similar terms a seizure under them before the bankruptcy, and charged the same breaches of duty.

There were also counts in trover, on which nothing turned, and money counts, under which the plaintiff claimed to recover the amount of an overcharge by the officer in respect of fees.

Pleas. 1. To the first seven counts, not guilty; 2. To the first five counts, leave and licence by Outram; 5. To the money counts, never indebted.

Issue on all the pleas.

The case was tried before Montague Smith, J., at the Stafford spring assizes, and the following facts were proved: On the 20th July, 1865, the writs mentioned in the first, third, and fourth counts, all bearing date the day previous, were delivered to the undersheriff for execution. On the same day the officer made a levy on Outram's goods and, having made an inventory, gave instructions, on the 21st, to a printer to print and circulate bills for a sale at one o'clock on the 26th. The officer gave evidence that the debtor requested him not to issue the bills, and actively interfered to prevent their circulation, and that in consequence of this a few only were distributed; that the debtor also requested him several times to postpone the sale, but that he declined to do so, and that all attempts on the part of the debtor to raise money having failed, he proceeded on the morning of the 26th to sell. Between nine and ten o'clock on that morning he commenced to mark the lots for sale, but at the request of

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Mr. Prince, the debtor's attorney, postponed the hour of sale to give him time to raise the amount required. The attorney then left, but afterwards returned, and told the officer he must proceed with the sale. The latter, who had that day received the writ mentioned in the second count of the declaration, then informed the attorney of this fact, and said that, no notice having been given, he could not sell under that writ without the debtor's authority, and Prince, acting on the debtor's behalf, gave him authority to sell for all the writs. He then sent the bell-man round with the bills, and at about two o'clock the sale commenced. The amount realized was 436*l.*, which was not sufficient to satisfy all the executions, as well as 41*l.* demanded for rent, and the sheriff's fees and charges. Evidence was given for the plaintiff that the goods were not properly lotted, that the officer hurried the sale, and otherwise acted negligently and improperly in it, and that the sum for which the goods were sold was greatly below their value.

On the 1st of August, Outram was adjudicated bankrupt on his own petition, and the plaintiff, the official assignee, received the proceeds of the sale, under 24 & 25 Vict. c. 134, s. 73, deducting the sheriff's charges, and afterwards commenced this action.

The jury found that the issue of the bills was prevented by the bankrupt, but that proper care was not used in lotting the goods, and gave a verdict for the plaintiff for 150*l.* on the counts for negligence, and 15*l.* on the money counts, leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, or to reduce the damages, on the ground that the bankrupt had appointed the officer as his special bailiff, or had, by his acts, disentitled himself from suing the sheriff.

Griffiths having obtained a rule accordingly,

Huddleston, Q.C., and *H. James*, shewed cause. There is no authority for the appointment of a special bailiff by the execution debtor, as to whom the whole proceeding is in invitum; and the cases relating to execution creditors, who have appointed special bailiffs, have no application. As to the debtor, the sheriff has a certain duty to perform, which cannot be varied by any dealing

with the officer, and his duty is to use proper care to realize the best price for the goods sold. But supposing it to be competent to the officer, by a contract with the execution debtor, to exonerate the sheriff from this duty, and to divest himself of the character of sheriff's officer, there is no evidence in this case of any such contract being made. This is nothing but the usual case of a debtor asking for indulgence. All the part that the debtor took in the matter was to prevent the issuing of the bills; and if there was any contract, it only reached to the extent of exempting the sheriff from liability for not advertising the sale. But the negligence for which the jury have given damages was negligence of the officer in the performance of his subsequent duty, and was not in any way dependent on or induced by the debtor's acts. To hold that the debtor by such interference made the officer his own agent, and no longer the agent of the sheriff, would be to go even beyond what has been held as to special bailiffs; for the appointment of a special bailiff does not wholly relieve the sheriff from his duty in respect of the writ which is put in execution: *Taylor v. Richardson*. (1) The case of *Cook v. Palmer* (2) may appear an authority for the defendant, but the judgment of Bayley, J., (3) shews that it is not so, for there goods, beyond the amount of the executions, having been sold at the request of the plaintiffs, a bankrupt's assignees, the learned judge says: "Upon that sale the officer was identified with the sheriff to the extent of the sum to be levied, but no further, his authority to sell to a greater extent not being derived from the sheriff, but from the plaintiffs and Theobald (the bankrupt), who merely made him their agent as to that part of the transaction. The sheriff never had any right to call upon the officer to pay over the surplus to him, nor was it the officer's duty to do so." But here the whole sale was under the writs, the officer was bound to pay over the whole to the sheriff, and the sheriff was bound to answer for the whole to the various execution creditors. But even if the bankrupt was estopped from suing, the assignee would not be bound by his acts. The rule can at the most only be made absolute to reduce the damages, for as to the 15*l.* for overcharges, the plaintiff is clearly entitled to retain his verdict.

Mellish, Q.C., and *Griffiths*, in support of the rule. If the execu-

(1) 8 T. R. 505.

(2) 6 B. & C. 739.

(3) At p. 742.

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tion creditor appoints a special bailiff, he relieves the sheriff from all liability for the manner in which the bailiff discharges his duty; for, although for all other purposes the bailiff remains the officer of the sheriff, yet, so far as concerns the creditor, he is no longer the agent of the sheriff, but of the creditor, and the sheriff is not answerable for his acts to the creditor, although he may still continue responsible to the debtor. Conversely, the debtor may, by adopting the officer as his agent, release the sheriff as towards himself, though not as towards his creditors; and if after this the officer is guilty of any negligence, the debtor's remedy is by an action against him personally on his contract. In the cases relating to special bailiffs, it has been held that an act of personal direction to the officer is sufficient to make him the agent of the creditor, and to discharge the sheriff from liability: *Ford v. Leche* (1), *Porter v. Viner* (2) and *Pallister v. Pallister*. (3) This is reasonable, because it is impossible to say how far the conduct of the officer may be influenced by the deflexion from his usual course of duty, which has been caused by the interference of a third party, and the reason is as applicable to the case of the debtor's as to that of a creditor's interference. In the present case, the interference by the debtor far exceeds that which in many cases has been held to make the officer a creditor's special bailiff, and it continued to the moment of the sale. The sale itself was postponed to a later hour at his request, and when it took place, it included goods that, but for his direction and waiver of the preliminary notices, could not have been sold at all at that time. Having thus interfered to alter the mode of sale, he cannot now sever the transaction, and hold the sheriff liable for the conduct of his officer in a matter of which he himself controlled the commencement. There is a right in the execution creditor to rule the sheriff to return the writ, unless he has done some act which has discharged the sheriff from responsibility to him; the refusal, therefore, to allow the creditor to rule the sheriff must proceed on the ground that he has so discharged him from responsibility, from which it follows that under circumstances that would justify the refusal no action could be brought by him against the sheriff. The execution debtor has a

(1) 6 A. & E. 699.

(2) 1 Chit. Rep. 613, n. (a).

(3) 1 Chit. Rep. 614, n.

similar right to rule the sheriff, and the same argument therefore applies in his case. But it is clear that such acts as the debtor has done here would, in the case of a creditor, disentitle him to rule the sheriff; they ought therefore to disentitle the debtor, and will consequently disable him from suing the sheriff: *Chitty Pr.* vol. i. p. 17 (12th ed.); *Harding v. Holden*. (1) The adjudication of bankruptcy having been made on the debtor's own petition, the assignee can stand in no better position than the debtor.

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MARTIN, B. It is clear that this rule must be discharged. There has not been any contract with the officer, nor anything like a contract, to make him agent of the debtor, instead of agent of the sheriff. With respect to the earlier part of the business, no doubt the debtor excused the performance of the statutory regulations, but as to the negligence in the sale, there is no evidence that he ever relieved the sheriff from his duty of taking care that the goods should realize their fair price.

BRAMWELL, B. The defendant's case fails upon the facts. He ought to be able to persuade us that the goods were sold not under the writ, but under the authority of the debtor, suspending the authority of the writ. But we cannot come to the conclusion that there was any such agreement. The authority of the writ was not superseded, though it may, as between the debtor and the sheriff, have been modified to this extent, that the debtor in substance said to the officer: "If you will delay issuing the bills, and if you will postpone the sale, I will not complain or hold you liable for the consequences." But subsequently the officer did act under the writ, and with the same latitude as if his authority had never been qualified, and for his conduct at this latter period the sheriff is not relieved from responsibility by anything that has passed.

CHANNELL, B. I think the rule should be discharged, because I agree that there is no evidence of any act done by the debtor to discharge the sheriff. There was perhaps a modification of the officer's authority, and as to acts done by him, under circumstances to which the modification applied, the sheriff might be exonerated; but the officer was not in any way discharged from his

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duty as officer to exercise care in the conduct of the sale, and the sheriff therefore remains liable for his negligence.

Rule discharged.

Attorney for plaintiff: *A. D. Smith.*

Attorney for defendant: *H. C. Barker.*

June 11.

LEE v. WILMOT.

Debtor and Creditor—Statute of Limitations—9 Geo. 4, c. 14, s. 1—Acknowledgment.

The defendant being indebted to the plaintiff wrote to the plaintiff, before the debt was barred by the Statute of Limitations, a letter containing these words, "I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week":—

Held, by Bramwell and Channell, BB. (Martin, B., dissenting), a sufficient acknowledgment in writing within 9 Geo. c. 14, s. 1.

To an action on a promissory note for 28*l.*, made by the defendant on the 20th of August, 1859, the defendant pleaded the Statute of Limitations. The action was commenced on the 19th of April, 1866.

At the trial, before Pigott, B., at Westminster, in Trinity Term, the plaintiff, in order to take the case out of the statute, put in evidence a letter written to him by the defendant on the 13th of August, 1863, which was as follows: "Dear Sir,—Your letter has reached me at last, after having been half over England. It is quite true that I have not sent you any money for years, but I really have none of my own. We just manage to exist on my wife's, at least on what is left of hers. We have hard work to get on, but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week. I remain, yours truly, F. S. Wilmot." The letter to which this was an answer was not produced, but its absence was not insisted on as an objection to the admissibility of the defendant's reply.

A verdict for 37*l.* for debt and interest was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, on the ground that the defendant's

letter was not a sufficient acknowledgment to take the case out of the statute.

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Crompton having obtained a rule accordingly,

Wills shewed cause. This is a sufficient acknowledgment in writing within 9 Geo. 4, c. 14, s. 1. There are two classes of cases upon this subject: the one where there has been an absolute and unconditional acknowledgment of the debt, though with an appeal to the forbearance of the creditor, the other where the acknowledgment is limited by some qualification or condition. In both cases the debt is taken out of the statute; for if the acknowledgment is distinct, a promise to pay is implied: but if the acknowledgment is simple and absolute, the promise implied is a promise to pay on request; if conditional, a promise to pay according to the condition: *Tanner v. Smart* (1), *Smith v. Thorne*, per Parke, B. (2) That the present case is within the former class is shewn by *Cornforth v. Smithard* (3), where the words, "I am ashamed the account has stood so long," were held to be a sufficient acknowledgment, and not to be limited by words following them which asked for time; and the fact relied on by the Chief Baron in that case is also present here, viz. the fact that the letter was written before the debt was barred, when the debtor, not being in a position to impose terms, cannot be reasonably supposed to have meant to restrict his promise. The remark of Bramwell, B., in *Sidwell v. Mason* (4), is also applicable: "it seems to me a mistake has been made in several cases with respect to the expression of hope, in holding that, because along with an unconditional acknowledgment of a debt a man expresses a hope to be able to do that which he was legally obliged to do, such an acknowledgment is not sufficient." A third class of cases, in which it has been held that there has been no sufficient acknowledgment, is illustrated by *Rackham v. Marriott* (5), and is characterized by the fact that in no part of the document is there any distinct acknowledgment of the existence of the debt.

Crompton, in support of the rule. To take the case out of the

(1) 6 B. & C. 603.

(4) 2 H. & N. at p. 310; 26 L. J.

(2) 18 Q. B. at p. 143; 21 L. J.

(Ex.) at p. 409.

(Q.B.) at p. 201.

(5) 2 H. & N. 196; 26 L. J. (Ex.)

(3) 5 H. & N. 13; 29 L. J. (Ex.) 228. 315.

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statute, the acknowledgment must be clear and unequivocal, for since it acts, not by reviving the old promise, but by creating a new one, it must be an acknowledgment from which this new promise may be implied: *Hurst v. Parker* (1); *Phillips v. Phillips*, per Wigram, V.C. (2); *Buckmaster v. Russell*, per Williams, J. (3) If, therefore, there is anything in the language inconsistent with that intention, the statute is not satisfied; here the debtor only offers to pay according to his ability. *Cockrill v. Sparke* (4), shews that the acknowledgment must be in direct terms.

[CHANNELL, B. There the reference to the debt by the surety was made with an entirely different view, and to enable the creditor to receive the dividends from the principal debtor's estate.]

The gist of the defendant's letter is a proposal as to the mode of payment, and the expression of a hope that he may be able to pay, and it therefore resembles the cases of *Rackham v. Marriott* (5) and *Hart v. Prendergast* (6), where such expressions were held insufficient; and on the other hand it differs from *Collis v. Stack* (7), for there the words were direct words of acknowledgment, though joined with a request for forbearance, whilst here there is a mere offer: see also *Smith v. Thorne*. (8) Further, whatever there was here in the nature of a promise, was made conditional by the words: "I will try to pay you a little at a time *if you will let me*," that is, if you will not sue me; and it ought to be shewn that the plaintiff assented to this: *Fearn v. Lewis* (9); see also *Cawley v. Furnell*. (10) It is also an objection that the defendant's letter, even if it is taken as clearly acknowledging anything, does not, in the absence of the letter to which it is a reply, shew what the debt is which is referred to: *Parmiter v. Parmiter*. (11)

[BRAMWELL, B. It is too late to raise that point; the letter should have been objected to as inadmissible without the other part of the correspondence.]

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| (1) 1 B. & A. 92. | (7) 1 H.&N. 605; 26 L.J. (Ex.) 138. |
| (2) 3 Hare, 281, at p. 300. | (8) 18 Q. B. 134; 21 L. J. (Q.B.) |
| (3) 10 C. B. (N.S.) at p. 749. | 199. |
| (4) 1 H. & C. 699; 32 L. J. (Ex.) | (9) 6 Bing. 349. |
| 118. | (10) 12 C. B. 291; 20 L. J. (C.P.) |
| (5) 2 H.&N. 196; 26 L. J. (Ex.) 315. | 197. |
| (6) 14 M. & W. 741. | (11) 30 L. J. (Ch.) 508. |

CHANNELL, B. I am of opinion that there was evidence here to take the case out of the statute, and that therefore this rule should be discharged. There is some difference of opinion amongst us as to the true construction of the document in question, but the difficulty arises entirely from the want of explicitness in its language, and not from any difference of opinion as to the principle which ought to govern our decision. I agree, that, to take a case out of the statute, there must be a promise or acknowledgment in writing, and I doubt whether the act meant two different things when it said "promise or acknowledgment." If there be a distinct acknowledgment it is not necessary that it should contain a promise in explicit terms, but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or by any other circumstance which excludes that inference. The construction which I put on this letter is, that it does contain an acknowledgment from which a promise to pay may be inferred, and that there is nothing in it to exclude that inference.

BRAMWELL, B. I am of the same opinion, and for the same reasons. The letter contains words sufficient, if they stood alone, to make a plain acknowledgment of the debt; but it is said that because these words are accompanied by an excuse for previous default, and a pledge that the debtor will do his best to pay, they are deprived of this effect, not on the ground that the other words alter their interpretation, but that they shew no absolute promise to pay to have been intended. But it seems to me much better to decide the case on the ground on which my Brother Channell puts his judgment, that this is an unequivocal acknowledgment, not limited by a refusal or any other qualifying statement. I cannot adopt the view that it is a conditional offer.

MARTIN, B. In my opinion this letter is not a sufficient acknowledgment. I consider the law to be correctly laid down in 2 Wms. Saund. 64 h. n. (c), in the note to *Hodsdon v. Harridge*: that "an acknowledgment operates only as evidence of a promise to pay; and accordingly, that upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but that where the party guards his acknow-

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ledgment, an implication will not arise. Thus, a refusal to pay will prevent the implication of a promise arising from such an acknowledgment; and a conditional promise to pay when able will prevent an absolute promise from being implied." I think the proper mode of deciding questions of this nature is, not by discussing other documents, but by giving a fair and candid construction to the one which is before us, and seeing whether, so construed, it contains a promise to pay. Now, if the letter stopped at the words "to get on," it is impossible to say that there would be any promise or acknowledgment, and when the debtor further says, "but I will try to pay you a little at a time if you will let me;" this means (the letter being written before the debt was barred), if you will not sue me I will do my best to pay you what I can. The fair and reasonable construction is, I think, that the debtor engages that he will do his best to endeavour to pay, that he will pay as he is able; and this excludes the implication of the absolute promise sued upon.

Rule discharged.

Attorneys for plaintiff: *Rickards & Walker.*

Attorney for defendant: *F. W. Blake.*

June 26.

LORD COLCHESTER AND OTHERS v. KEWNEY.

Land tax—Exemption—Hospital—Construction—38 Geo. 3, c. 5, s. 25.

In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) is contained an exemption from land tax of "any hospital," in respect of its site.

Commissioners, appointed by the Crown to administer a fund subscribed by the public for that purpose, founded, in 1857, an asylum for the maintenance and education of three hundred daughters of soldiers, sailors, and marines, dying in active service. The asylum was built and maintained entirely out of that fund, and solely for the benefit of the children, and was under the control of the commissioners:—

Held, first, that the asylum was not within the exemption in the act. Secondly, that it was not exempt as Crown property.

The exemption in the act only applies to institutions existing at the time when the tax was made perpetual.

Land previously chargeable with land tax is not exempted by becoming Crown property.

Semble, that such an institution is a hospital, within the meaning of that word

in 38 Geo. 3, c. 5, s. 25, and, if existing at the time when the act was passed, would have been within the exemption.

Semble, that an institution so founded, maintained, and governed, is not Crown property.

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THIS was a case stated without pleadings, raising the question whether the Victoria Asylum was liable to the payment of land tax.

The plaintiffs (Lord Colchester, Sir John Pakington, and the Hon. James Lindsay) are three of the royal commissioners of the patriotic fund, and are their trustees. The defendant is the land tax collector for the parish of Wandsworth, acting for the division of West Brixton in Surrey, within which division the Victoria Asylum is situated.

By a royal commission, dated the 7th October, 1854, the late Prince Consort, the plaintiffs, and others, were appointed to inquire into the best means of applying, according to the intentions of the donors, the sums of money subscribed by the public for the relief of the widows and orphans of soldiers, sailors, and marines, dying in active service; and to apply the same from time to time, as they, or any three of them, might think fit; and it was directed that the fund should be called the patriotic fund.

The commissioners, after expending a large portion of the fund in immediate relief, resolved to establish an institution for the education of three hundred daughters of soldiers, sailors and marines. In June, 1857, they purchased from Lord Spencer a piece of land on Wandsworth Common, which was conveyed to the plaintiffs, and to Lord Herbert (since deceased), and on this land they afterwards built the Royal Victoria Patriotic Asylum.

The land was bought, and the asylum built and endowed, wholly out of the patriotic fund, and is wholly used for the above-mentioned purpose, and no children are admitted, or are eligible for admittance, except the daughters of non-commissioned soldiers, sailors, and marines, dying in active service. The inmates are lodged and boarded in the asylum, and entirely maintained, clothed and educated there, out of a portion of the patriotic fund, set aside to the Royal Victoria Patriotic Asylum account, and invested in public securities under the control of the paymaster-general. The expenses of the hospital are paid out of the income of the endowment, and, in case of deficiency, out of the patriotic fund. The

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asylum is occupied and used, under the management of the commissioners, solely by the children, and the necessary officers and servants of the establishment, who are paid, appointed, and removed by the commissioners, for the sole benefit of the children, and for no other purpose.

In August, 1863, the asylum was assessed to the land tax at 37*l.* 10*s.* for the half-year; the plaintiffs claimed exemption, and appealed to the local land tax commissioners, who confirmed the assessment and dismissed the appeal. The plaintiffs still refused to pay, and the defendant having distrained, they paid the assessment and costs of distress, and brought the present action to recover the money so paid.

The question for the decision of the Court was, whether or not the asylum was absolutely exempt and free from being assessed and rated to the land tax, for or in respect of the site thereof, and the buildings within the walls and limits thereof. If the asylum was not so liable, judgment was to be for the plaintiffs for 37*l.* 10*s.* and costs. If it was so liable, judgment was to be for the defendant with costs.

May 28. *The Solicitor General (Sir R. P. Collier) (Prideaux with him)*, for the plaintiffs. First, the asylum is exempt as a hospital, under 38 Geo. 3, c. 5, s. 25. (1) That act was the last of the yearly

(1) The following are the sections of 38 Geo. 3, c. 5, referred to in the argument:—

38 Geo. 3, c. 5, s. 25. Provided that nothing in this act contained shall extend to charge any college or hall in either of the two universities [of Oxford or Cambridge], or the colleges of Windsor, Eaton, Winton, or Westminster, or the corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley, or any hospital [in England, Wales, or Berwick-upon-Tweed] for or in respect of the sites of the said colleges, halls, or hospitals [or any of the buildings within the walls or limits of the said colleges, halls, or hospitals] or any

master, fellow, scholar [or exhibitor] of any such college or hall, or any reader, officer or [master] of the said universities, colleges, or halls, or any masters or ushers of any schools [in England, Wales, or Berwick-upon-Tweed], for or in respect of any stipend, wages, [rents,] profits [or exhibitions] whatsoever arising or growing due to them in respect of the said several places or employments in the said universities, colleges, or schools; or to charge any of the houses or lands [which on or before the 25th day of March, 1693, did belong * to the sites of any college or hall * in England, Wales, or Berwick-upon-Tweed, or] to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas and Bethlehem

land tax acts ; by 38 Geo. 3, c. 60, s. 1, the land tax as assessed by it was made perpetual ; and by 42 Geo. 3, c. 116, s. 1, the latter act was

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Hospitals, in the city of London and borough of Southwark, or any of them, or to the said corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley ; or shall extend to charge any other hospitals or almshouses [in England, Wales, or Berwick-upon-Tweed,] for or in respect only of any rents or revenues [which, on or before the said 25th day of March, 1693, were] payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only.

s. 26 enacted that no tenants holding any lands or houses of "the said corporation, or any of the said hospitals or almshouses," should be exempted by the act ; but that the houses and lands so held should be rated for "so much as they are yearly worth over and above the rents reserved and payable to the said corporation or to the said hospitals or almshouses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and almshouses"

s. 27 provided that the act should not exempt "any tenant of any of the houses or lands belonging to the said colleges, halls or hospitals, almshouses or schools, or any of them," who was bound by lease or contract to pay all rates, taxes, and impositions.

s. 28 provided that, in case any question should be made how far any lands or tenements belonging to any hospital or almshouse not exempted by name out of the act, ought to be assessed to the land tax, the same should be determined by the Land Tax Commissioners, whose determination should be final.

s. 29. Provided always, and it is

hereby enacted, that all such lands, revenues, or rents belonging to any hospital or almshouse, [or settled to any charitable or pious use,] as were assessed in the fourth year of the reign of their late Majesties King William and Queen Mary, shall be and are hereby adjudged to be liable to be charged towards the payment of this present aid ; and that no other lands, tenements or hereditaments, revenues or rents whatsoever [then] belonging to any hospital or almshouse [or settled to any charitable or pious uses] as aforesaid, shall be charged, taxed, or assessed by virtue of this present act [towards the said sum to be raised in England, Wales, and Berwick-upon-Tweed as aforesaid ;] anything herein contained to the contrary notwithstanding.

The first two sections existed in substance in the Land Tax Act of 4 Wm. & M. c. 1, as ss. 22 & 23, and occurred in various positions in all the subsequent acts. The parts of the principal section (s. 25) of 38 Geo. 3, c. 5, which are wanting in the corresponding section (s. 22) of 4 Wm. & M. c. 1, are indicated above by brackets. The history of the material alterations in it is as follows: the words "or any of the buildings within the walls or limits of the said colleges, halls, or hospitals," were first introduced in 10 Wm. 3, c. 9, s. 21 ; the words "which on or before the 25th day of March, 1693, did belong to" (the words in the ninth bracket as far as the first asterisk) were substituted for the word "belonging," and the words "which on or before the said 25th day of March, 1693, were" were introduced, in 1 Ann. c. 6, s. 65 ; in 1 Ann. st. 2, c. 1, s. 30, the words in the ninth bracket from the first to the second asterisk, viz., "to the sites of any college or hall," were added ; and

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repealed, except so far as it makes perpetual the land tax. The question of rateability therefore turns on 38 Geo. 3, c. 5, s. 25, and on a comparison of that section with the corresponding section (s. 22)

the words "in England, Wales, or Berwick-upon-Tweed," throughout the clause, were introduced in 6 Ann. c. 35, s. 21, that being the first land tax act passed after the Act of Union (6 Ann. c. 11), and the provisions relating to the land tax in Scotland being then placed in the latter part of the same act. Besides this, the clause was varied from time to time by the insertion of specific charities, which were afterwards dropped out, by the limitation (in 5 Wm. & M. c. 1, s. 19) of the exemption at the end of the section, to almsmen and almswomen whose annual maintenance and profits should not exceed in the whole 20*l.*, which also was omitted in 9 Wm. 3, c. 10, s. 21, and by the addition in 8 & 9 Wm. 3, c. 6, s. 38, after the word hospital, of the words "or almshouse, or any free school," which were struck out again in 9 Wm. 3, c. 10, s. 21. In the 6 Ann. c. 35, s. 21, and thence to 13 Ann. c. 1, s. 24, the clause stands as it does in 38 Geo. 3, c. 5, s. 25, except that the word "master," where it is inclosed above in brackets, has at some period between the two last-mentioned acts been substituted for the word "minister," which up to the 13 Ann. occurs in all land tax acts.

The act of 4 Wm. & M. c. 1, has been referred to because in 10 Wm. 3, c. 9, s. 6, and ever since up to the 38 Geo. 3, c. 5, s. 7, the commissioners have been directed in making their assessments to have regard to the proportions in which the districts were rated in the assessment made under that act. But in the previous land tax acts similar clauses occurred, and in that of 1 Wm. & M. c. 3, s. 17, the exemption of Christ's Hospital, &c., was limited to the revenues to be applied to the use of the poor, the words "or shall extend

to charge any other hospital or almshouse," together with the word "almshouses" at the end of the clause being omitted. In 1 Wm. & M. c. 20, s. 19, and in 1 Wm. & M. sess. 2, c. 1, s. 20, the institutions mentioned in the earlier part of the section were included in this limited exemption; in 2 Wm. & M. sess. 2, c. 1, s. 16, they were again omitted; in 3 Wm. & M. c. 5, s. 17, the words "or any other hospital or almshouse" were inserted; and finally in 4 Wm. & M. c. 1, s. 22, the words "nor to extend to charge" were inserted, and "or" was omitted, and the charity for the widows and children of clergymen and Bromley College were also added to the list of exempted institutions. These two charities had once before, in 1 Wm. & M. sess. 2, c. 1, s. 20, obtained the same favour, and in the same section also the words "or almshouse or any free school," had been inserted in the place in which, as has been already stated, they appeared in 8 & 9 Wm. 3, c. 6, s. 38.

The 27th section of 38 Geo. 3, c. 5, first appears as s. 23 of 9 Wm. 3, c. 10.

Clauses answering to 38 Geo. 3, c. 5, ss. 28, 29, first occurred as ss. 32, 33 in 2 & 3 Ann. c. 1, and were in the same words, except that in the latter clause the words "or settled to any charitable or pious use," and the word "then," appear first in 9 Ann. c. 1, s. 30, and that the words "towards the sum to be raised in England, Wales, and Berwick-upon-Tweed," were first inserted in 6 Ann. c. 35, s. 25, for the same reason which caused the insertion of similar words in s. 21 of the same statute.

The above-mentioned acts of William and Mary, William, and Ann., are referred to in the Record Commissioners' edition of the statutes.

of 4 Wm. & M. c. 1, as the assessment of the latter act has almost ever since been directed to be followed. In that act "hospitals" are exempted; and from the particular institutions which are exempted by name in the same section, it appears that the asylum is within the meaning of the word. Lord Coke says obiter in the case of *Sutton's Hospital* (1), that there can be no legal hospital unless the poor of the hospital are incorporated; he vouches no authority for this, and appears to lay it down only in order to get rid of the power of visitation by the patron (which would follow from calling it a lay hospital) in favour of visitation by the governors. But whether that statement be true or not, it is clear that this cannot have been the meaning of the legislature, who must have used the word in its current sense, and that included any institution dedicated to the relief of the poor, at least where those receiving relief reside within its walls. Dr. Johnson, in his dictionary, defines a hospital as, "a place built for the reception of the sick, or support of the poor," and Du Cange, in his glossary, gives as one meaning of "hospites" in mediæval latin, "pauperes" (see also *ibid.* sub voc. "hospitalis"). The instances of Sutton's Hospital (the Charterhouse), and of Christ's Hospital and Bridewell Hospital (2), which are mentioned in the act itself, shew that the meaning is restricted neither to what Lord Coke calls a legal hospital, nor to the institutions for the cure of disease, which alone are commonly so called at the present day, but that it embraces any such as would be included in the definitions of Johnson and Du Cange; and abundant instances prove that this was the meaning borne by the word at that time.

Assuming it to be a hospital, the fact that it has been founded since the 38 Geo. 3 does not prevent it from enjoying the exemption. In *Harrison v. Bulcock* (3), which was decided in 1788, it was held that lands which had been made part of the site of a hospital founded since 1693, were exempt; and in *All Souls College v. Costar* (4), decided in 1804, that decision was followed with respect to lands added to a previously existing college, since that date, but before 1797. It is plain, therefore, that while the annual land tax acts continued, new foundations, and lands added to old ones,

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(1) 10 Rep. 31 a.

(2) See 10 Rep. 31b.

(3) 1 H. Bl. 68.

(4) 3 B. & P. 635.

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enjoyed the benefit of the exemption, and it is submitted that no difference is made by 38 Geo. 3, c. 60, making the tax perpetual. This would be to assume that the intention of the legislature was changed towards such institutions without any alteration in their language, and in such a case it may be said that clear words are needed to impose the tax.

Secondly, if not otherwise exempt, the asylum is privileged as Crown property. It is founded in pursuance of a royal commission, and is governed by the commissioners, Her Majesty being the visitor: *Attorney General v. Hill*. (1)

Mellish, Q.C. (Philbrick with him), for the defendant. First, the present institution is not either within the strict legal meaning, or the popular meaning of the word "hospital"; for even if it were conceded that popularly a hospital is a place for the "support of the poor," the asylum does not answer that description, but is mainly devoted to the purpose of educating the young. The ordinary meaning, however, is rather "a place for the relief of the sick": Co. Litt. 342 a. But even assuming it to be a hospital, it cannot claim the privilege, since it has been founded and its site acquired since the land tax was made perpetual. Under that act, the amount of the tax which each district, as well as each county was to bear, was finally fixed; and the effect of allowing fresh land to be now taken out of taxation would be to throw a heavy burden on neighbouring property. This was felt seriously, as appears from Lord Alvanley's remarks in *All Souls College v. Costar* (2), even whilst the commissioners had a power of remodelling the assessment; but it is a much greater burden now that the amount to be contributed by each district is fixed, so that the deficiency caused by the exemption has to be made good out of a narrower area.

[BRAMWELL, B. It is an argument in your favour that if the legislature spoke of existing institutions, they spoke of what they knew, and could calculate the effect of the exemption; and with yearly acts this would be so in substance, even if they included future foundations; but if, when they made the tax permanent, they included future foundations, they dealt with what they could have no knowledge of.]

(1) 2 M. & W. 160.

(2) 3 B. & P. at p. 642.

Further, the tax was made permanent with a view to its redemption, which was provided for by the same act (38 Geo. 3, c. 60). The scheme of the act was to give an inducement to its redemption, and a facility for its calculation, by making it as far as possible a permanent and ascertained charge; but though this would be consistent with retaining the existing exemptions, it would not be consistent with allowing new ones to be added, which would vary the amounts within the districts.

Secondly, this is not Crown property; it was not purchased and is not supported by public funds in the strict sense, but by a number of private subscriptions voluntarily contributed for this purpose, and to which the donors assign the destination. But, if it were, yet the land having been bought subject to the tax, it would by the above reasoning still remain liable to it as to any other fixed charge.

The Solicitor General, in reply.

Cur. adv. vult.

June 26. The judgment of the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.) was delivered by

CHANNELL, B. The question for our decision in this special case is, whether the site of the Royal Victoria Patriotic Asylum is liable to be assessed to land tax. Exemption is claimed by the plaintiffs, who are the trustees of the asylum, on two grounds; first, that this asylum is a hospital, and therefore exempt by the 25th section of the 38 Geo. 3, c. 5; secondly, that it is Crown land, and therefore exempt. On the part of the defendant these propositions are disputed, and it is further contended, that even if this were a hospital within the meaning of that word in the section in question, yet it was not in existence in the thirty-eighth year of Geo. 3, and that the exemption only extends to institutions then existing.

The facts are fully set out in the case, and it will not be requisite further to refer to them. It will, however, be necessary to examine the statutes imposing the land tax, to shew how the law now stands, and the successive changes that have been made.

The tax appears to have been first imposed as an annual tax in the time of William and Mary, and to have been continued by

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several successive acts of parliament. Those acts imposed, not only the tax now known as the land tax, but also a tax on personal property and salaries, somewhat analogous to the present income or property tax, and from the time of the 4 & 5 of Wm. & M. they contained a clause exempting hospitals from its operation, in somewhat similar terms to that hereafter referred to. These annual acts appear to have been passed in much the same terms until 1797, the date of 38 Geo. 3, c. 5, the last annual act.

The 25th section of that act provides, that nothing in the act shall extend to charge any college or hall in either university, or certain colleges named, or the corporation of the sons of the clergy or the college of Bromley, "or any hospital in England, Wales, or Berwick-upon-Tweed, for or in respect of the sites of the said colleges, halls, or hospitals, or any of the buildings within the walls or limits of the said colleges, halls, or hospitals." The section then proceeds to provide for the exemption of persons connected with such institutions from the tax on their salaries, and also for the exemption of lands which in 1693, the date of the act 4 Wm. & M. had formed part of the site of any college or of certain specified institutions, and also that the act should not charge "any other hospitals or almshouses," in respect of lands the rents of which in 1693 had been applicable solely to the relief of the inmates.

Now the first question that arises is, whether, if this asylum had been in existence at the passing of this act, the trustees could have claimed exemption. It is objected that they are not incorporated, and that there can be no hospital without incorporation, and no doubt the old authorities tend to shew that an hospital must be incorporated. But they shew something more, for Lord Coke says in *Sutton's case* (1), that there is no legal hospital except where the poor persons benefited are themselves incorporated; and he says that where the corporate succession is vested in trustees to effectuate the purposes of the institution, that is no legal hospital. It seems, however, tolerably clear that a legal hospital in that sense is not meant, when the word *hospital* is used in this section; for, towards the end of the section, the words "other hospitals" are followed by the names of some particular hospitals, some of which

(1) 10 Rep. 31 a.

seem not to be incorporated in such a manner as to make them legal hospitals under this definition. If, then, we understand that the word *hospital* in the section does not mean strictly a legal hospital, is there any reason for supposing there need be any corporation at all? It seems rather more reasonable to hold that the word is used in a popular sense only, and that any institution which, though not in a strictly legal, might in a popular, sense be called a hospital, might claim exemption. But some doubt may arise whether, even upon this view, this institution would be a hospital, by which word we understand rather an institution for the relief of the sick or aged than for the maintenance and education of children. We do not speak of a hospital for orphans.

Upon the whole, we are inclined to think that, if the institution had been in existence at the time of the passing of the act 38 Geo. 3, c. 5, it might have claimed exemption. But this is not so clear as to make it unnecessary to consider the position of a subsequently founded hospital of this character, and the course of the subsequent legislation. In the same session (38 Geo. 3) was passed another act (c. 60), which enacted that the sums charged by the previous act (c. 5) on counties, towns, and places, in respect of land within the same, to be raised, levied, and paid within a year, should be raised, levied, and paid yearly for ever; and the several powers, provisions, clauses, &c., of the former act should, except as in the second act altered or varied, be in full force as if repealed and re-enacted in that act; but that all this should be subject to redemption as therein provided. By subsequent statutes the provisions for redemption were from time to time altered, repealed, re-enacted, and consolidated; but the scheme remained the same, and the alterations were principally of the machinery and regulations for carrying it into effect.

Now, one object of the legislature in passing the act was to support the public credit by imposing a fixed charge on land, on the strength of which money could be borrowed, and to relieve the country of a portion of the existing debt on advantageous terms. Provision was made for redemption of the tax by transferring to the commissioners for the reduction of the national debt a sum in consols, the income of which should exceed by one-tenth the tax to be redeemed. At this time the funds were

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greatly depreciated as compared with other securities, and especially with land. A permanent charge of 10*l.* a year upon land would, therefore, be of greater value in the market than a sum producing 11*l.* a year in the funds. It would, therefore, if the then imposed tax was to be permanent, be to the interest of landowners to redeem; and upon their doing so the revenue would be benefited to the extent of one-tenth of the tax redeemed. It was, therefore, the policy of the legislature to encourage redemption. That this was so we see from the extensive powers given to persons having a limited interest only to raise money to redeem the tax; from other inducements held out to landowners to redeem, and from the fact that, upon refusal of the owners, third persons might purchase the tax, retaining it as a charge payable to themselves. But no one would have redeemed the tax unless it had been made a permanent charge upon the land, not likely ever to be much less in amount, and not to be got rid of except by redemption. If that were the case, the redemption would naturally increase the market value of the land, and would do so, as we have shewn, to a greater extent than the sum required to be expended in the redemption. If, however, the land was to be liable to the tax in the hands of one purchaser, but not of another, the value of the land to sell would not be increased in proportion to the outlay for redemption. To carry out the policy of the act, therefore, we should expect to find that no new or shifting exemptions could arise or come into effect after the tax became permanent.

The effect of the acts on several points was explained in *The Queen v. The Land Tax Commissioners*. (1) Upon each district separately assessed a fixed quota was to be charged. That was not to be altered, although before levy the amount of tax redeemed within the district was to be deducted, and the remainder only levied. This was to be levied on the lands not exonerated by redemption. These lands were to be assessed yearly by an equal pound rate, sufficient to produce the required amount.

We see, therefore, from this, in the first place, that the amount of tax payable on any particular portion of land would increase or decrease, not according as the value of land increased or decreased absolutely, but according as it increased or decreased relatively to

(1) 2 E. & B. 694.

the other lands in the district not exonerated. And, as any owner who was about to improve his land to such an extent as to have any effect on the rest of the district, might be expected first to redeem the tax, no person could ever expect that the amount of tax upon his land would ever be sensibly diminished, although he would know that if he improved without taking the precaution of redeeming, the tax would be increased. We see then that this inducement for redemption, viz. that no loss was likely to be incurred, was actually held out by the legislature.

In the next place we see that if any portion of land chargeable with the tax came into the hands of a proprietor having a valid claim of exemption, a greater burden would be thrown upon the remainder of the district; for the amount to be raised would be the same as before, and the land on which it was to be charged less. This of itself is a strong argument for supposing that all exemption must attach at the time these quotas were thus permanently fixed, and must in all changes of ownership follow the land, and not the proprietor. As long as the tax was imposed annually, although the legislature in fact imposed the same quota on each district as they had done before, it must be taken that this was done deliberately and after consideration of all the changes that had taken place in the ownership of property since the last act. Accordingly, we find in two cases arising under the temporary acts, viz. *Harrison v. Bulcock* (1), and *All Souls College v. Costar* (2), that it has been held, with respect to additions to hospitals and colleges which had been made since exemption was first given, but before the act imposing the tax under which the assessment complained of was made, that such additions were exempt. The distinction between those cases and the present was noticed in one of them, the *All Souls College* case, by the Chief Justice of the Common Pleas, Lord Alvanley, who says that, with respect to colleges founded since the land tax was made perpetual, he would say nothing. The inference we are disposed to draw from what was said in that case is, that the important thing to see in construing the exemption is, whether or not the land was within the exemption at the time of the passing of the act imposing the tax. In that

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case it was, in the present it was not. Considering, therefore, the hardship on other proprietors in the district which would be caused by shifting exemptions, coming into operation on a change of ownership, together with the evident policy of the act to make the charge on land a permanent one, with a view to encouraging its redemption for the benefit of the revenue, we think we should hold that there can be no exemption in the case of lands not exempt when the tax was made permanent. The same conclusion would, we think, necessarily be drawn from a strict construction of the words of the exception; for "any hospital" must mean any existing hospital.

Then the further question arises, whether this asylum is exempt as Crown land; but to this we think the same reasoning will apply. There is, indeed, very great doubt whether, supposing this asylum to have been in existence in 1797, it would have been exempt on this ground, viz. as Crown land. It is true the commissioners were appointed by the Crown, and to some extent for public purposes, but it was mainly to administer funds contributed for a particular purpose by individuals; and all taxes or other imposts charged upon them would be payable from these funds, and not from the public purse. But however that may be, we think that these lands, having been chargeable with land tax when belonging to Lord Spencer, as we presume to have been the case, although it is not distinctly stated, would be chargeable still in the hands of the Crown if directly purchased for the Crown. The case quoted to shew that Crown lands are not chargeable with land tax (*Attorney-General v. Hill*) (1), seems to us to favour this view rather than the contrary, for it was distinctly found in that case (2) that the assessment complained of on Deptford Dockyard was for land which had formed part of the dockyards when the land tax was made perpetual. This shews that, in the opinion of the late Mr. Justice Wightman, who was then counsel for the Crown, it was a material point in order to make out the exemption. It may be observed that the effect of holding that the Crown must pay the land tax chargeable on land which it may purchase is not really to tax the Crown, but merely to make the Crown pay the market price for land purchased. If the tax had

(1) 2 M. & W. 160.

(2) At p. 163.

been previously redeemed, of course the purchase money would have been larger, and the difference between the purchase money in the two cases would be gained by the Crown at the expense of the other proprietors of the district, not at the expense of the public revenue, whenever it purchased lands on which the tax had not been redeemed, if the exemption claimed were to be allowed. If there were any provision for reducing the amount of the tax to be levied on the district, of course the case would be different.

There may be some difficulty in enforcing payment against the Crown, and we do not say that all or even any of the remedies provided for ordinary cases could be resorted to. We do not, however, think that this shews that the lands would not be still chargeable, or that an assessment, in which part of the quota to be levied on the district was assessed on Crown lands chargeable before they became Crown lands, would not be a good one.

For these reasons we think that our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Sweeting & Lydall.*

Attorneys for defendant: *Batt & Son.*

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ATTORNEY GENERAL TO THE PRINCE OF WALES v. CROSSMAN.

June 26.

Practice—Venue—Prerogative—Duchy of Cornwall.

An information was filed by the Attorney General to the Prince of Wales, to recover dues payable in Devon to the Prince, as Duke of Cornwall, and the venue was laid in Middlesex. On an application by the defendant to change the venue to Devon, it appeared that all the witnesses to facts resided there; but that, as the defendant disputed that the dues were payable to the Prince in right of the Duchy, the records of the office of the Duchy in London would have to be produced at the trial.

The Court, on the above facts, and on the ground that the Crown would have a right to allege an interest in the suit, and to claim a trial at bar, refused the application:—

Semble, that such a suit is in the nature of a transitory action, and that the Crown filing the information, would be entitled to lay and keep the venue where it pleased.

Semble, also, that the Prince of Wales, suing as Duke of Cornwall, would have the same right.

THIS was an application on behalf of the defendant to change the venue, in a suit commenced by an information filed in this

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court by the Attorney General of the Prince of Wales, Duke of Cornwall, against Thomas Crossman. The information alleged that the defendant was indebted to the Prince in the sum of 10*l*. for moneys due and payable to the Prince for certain customs and dues chargeable in respect of goods imported by the defendant into, and for breaking bulk from ships arriving from abroad within, the outport of Torquay, in the waters of Dartmouth, parcel of the ancient possessions of the Duchy of Cornwall, in the county Devon; which moneys were to be paid by the defendant on request; and that the defendant had not paid the said sum or any part of it; and prayed the advice of the Court in the premises. The venue was laid in Middlesex.

The defendant applied to change the venue to Devon, and made an affidavit that the cause of action arose there, and that all the witnesses of fact resided in Torquay or the immediate neighbourhood. The solicitor for the Duchy made an affidavit to the effect that the suit was brought for the recovery of certain dues part of the ancient revenues of the Duchy; that he was informed and believed that the defendant intended to defend the suit, upon the ground that the dues were not payable to the Prince in right of the Duchy; that, having searched the records of the office of the Queen's Remembrancer, he had not been able to find any precedent of a change of venue at the instance of a defendant in a personal suit commenced by information, either by the Crown or the Prince of Wales suing in right of the Duchy, and that it had been always the practice in such suits to lay the venue in any county which the Attorney General for the Crown or Duchy might select. These affidavits were not filed, but were referred to and used on the argument. The application had originally been made at chambers, before Channell, B, who referred the matter to the Court.

White moved to change the venue to Devon, and obtained a rule, against which

Karslake, Q.C., and *Garth*, shewed cause in the first instance. This is not an action by the Prince of Wales, but an information filed by him in the Exchequer in respect of the Duchy of Cornwall, and for the present purpose it must be assumed to have

been properly filed. His power to sue by information is however established by the *Attorney General v. Mayor of Plymouth* (1), *Attorney General to the Prince of Wales v. St. Aubyn* (2); in this respect he has the prerogative of the Crown, which has an alternate fee with him in the Duchy; and his interest is so far identified with that of the Crown, that, on his death pending a suit, that suit may be taken up and carried on by the Crown coming into possession of the Duchy, as was actually done in the first case cited. The interest of the Crown is in immediate succession to his, the Duchy not descending on the death of the Prince of Wales to his eldest son, but reverting to the Crown: see *The Prince's Case* (3); *Attorney General v. Mayor of Plymouth* (4); *Attorney General to the Prince of Wales v. St. Aubyn* (2); in respect of the Duchy, therefore, he is on the same footing as the Crown, and may sue with the same rights. One of these rights of the Crown is in all transitory actions to lay the venue where it pleases, and to retain it there: *Attorney General v. Smith* (5); this was originally the right of every plaintiff, his power being first controlled by 6 Rich. 2, c. 2, which aimed at compelling him to bring his action in the county where the cause of action arose; and on the equity of this statute was afterwards founded the practice of changing the venue upon the application of the defendant, or ultimately of either party: see *Attorney General v. Churchill*. (6) Tidd's Practice, vol. i. p. 601. But the Crown, not being named, is not bound by the statute (which besides refers to actions only and not to informations), nor by this practice, and therefore retains the same power, which is also enjoyed by the Prince of Wales suing in right of the royal possession of the Duchy. [They also referred to 28 & 29 Vict. c. 104, s. 46, and the rules on the revenue side of the Exchequer, 1860, 1861, 1863.] But supposing the defendant entitled to make this application, the balance of convenience is against the change of venue; the right to the dues being disputed, the case will mainly turn on the old records of the Duchy, which are all in London, and which, if the

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(1) Wigh. 134.

(2) Wigh. 167, 238, 247, 258.

(3) 8 Rep. 1, 27; and see documents

(4) Wigh. 134, 150.

(5) 2 Price, 113.

(6) 8 M. & W. at p. 193.

in app. to Concanen's report of *Rowe v. Brenton*.

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defendant succeeds, will have to be sent down in the custody of the officers to Devonshire. Moreover, the Crown may allege an interest in the suit, and require a trial at bar, which would defeat the defendant's purpose: *Rowe v. Brenton*. (1)

White and Channell, in support of the rule. It is decided in *Attorney General v. Churchill* (2), that the privilege which the Crown has to lay the venue where it pleases is confined to personal actions, meaning by personal actions all such as are not local; but the present suit, which, though in form for debt, is, in fact, for tolls, is in substance a local action, and is therefore not within the privilege. It can make no difference that its form is not that of an action but an information; the reason of the rule, and therefore the rule, are the same in both cases. Even if the Crown were suing, therefore, the privilege would not be made out, and it is not necessary to bring precedents in support of the application, for it lies on those who claim the prerogative of excluding the defendant from his common right, to prove it clearly. But this is still more necessary, where the prerogative of the Crown is claimed on behalf of another person than the sovereign.

But even supposing the Crown to have the right claimed, and the Prince also to have it in respect of the Duchy, the Court will, on the ground of convenience, change the venue against the claim of privilege. An instance of change of venue from Middlesex, where an attorney was plaintiff, is mentioned by Dolben in *Pye v. Leigh* (3), and it was done against the privilege of peerage in *Earl of Shaftesbury v. Craddock*, and *Earl of Shaftesbury v. Graham* (4), and even in a case of scandalum magnatum mentioned there.

[*Karslake, Q.C.*, referred to two cases of scandalum magnatum, where an application for a change of venue was refused, although grounds of convenience were alleged. *Lord Stamford v. Nedham* (5) and the *Marquis of Dorchester's case*. (6)]

(1) 3 M. & R. 133; 8 B. & C. 737.

(2) 8 M. & W. 171.

(3) 2 W. Bl. at p. 1066.

(4) 1 Ventr. 363, 364; Skin. 40, 43; Sir T. Jones, 192; 2 Show. 197.

(5) 1 Lev. 56.

(6) 2 Mod. 215; see 21 Vin. Ab. 132, pl. 11, and the case of *Rickaby*

v. Wilson, in Serjeant Hill's MSS. in Lincoln's Inn Library. In this action, which was brought against the defendant, the member for Cumberland, for three days' treating at the last election, the venue was laid in Yorkshire, and the defendant, in Mich. Term, 19 Geo. 2, moved to change it to Cumber-

It is submitted that the arguments of convenience are here in the defendant's favour, and with respect to the right to a trial at bar, no such application is recorded to have been ever made on the part of the Prince of Wales; *Rowe v. Brenton* (1) was tried at a time when there was no Prince of Wales, and the Duchy was in the possession of the Crown.

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June 26. The judgment of the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.) was delivered by

CHANNELL, B. This was an information filed by the Attorney General for His Royal Highness the Prince of Wales, Duke of Cornwall, to recover certain port dues alleged to be due from the defendant, claimed by the Duchy in respect of goods brought into and landed at Torquay, which is alleged by the Attorney General for the Prince to be a member of the port of Dartmouth (referred to in *Hale de Portibus Maris*, p. 48). The venue in this information is laid in Middlesex.

Application was made by the defendant to a judge at Chambers, to change the venue to the county of Devon.

This application was supported by an affidavit, which, if made

land, on an affidavit that the cause of action arose there. A rule to shew cause being granted, the plaintiff opposed it on the ground of the defendant's influence in Cumberland, and because plaintiff's creditors were pressing him, and one of his witnesses must in June go to Ireland. The defendant on the other hand alleged that both parties lived in Westmoreland, that he must bring many witnesses sixty miles into Yorkshire, and that, as he had privilege of parliament, the cause would probably in any case not be tried at the Lent assizes. The case of the *Earl of Shaftesbury* and *Knight's* case, Salk. 670, were cited. Willes, C.J., said he did not like the case of *Lord Shaftesbury*, and it should have no weight with him; and Parker and Burnett, JJ., said that it was a matter

of discretion to change the venue or not, which discretion was governed only by the rules of justice. That they never changed the venue to Pool, Hull, Canterbury, and such towns as are counties of themselves, because we don't know the year in which the assize will be held there. That it has not been usual to change the venue into Bristol, Westmoreland, and other counties, where the judges go but once a year, in a Michaelmas or Hilary Term, by reason of the delay; and for this reason, as well as because of plaintiff's witness that must go to Ireland, and the earnestness of plaintiff's creditors, sworn in plaintiff's affidavit, the Court now refused to change the venue, and discharged the rule for shewing cause.

(1) 3 M. & R. 133; 8 B. & C. 737.

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in an ordinary action between subject and subject, and not answered, would have been sufficient to entitle the defendant to have the venue changed, on the ground that the cause of action arose within the county of Devon. It would still, however, have been open to the judge in such an action to have retained the venue in, or restored it to, Middlesex, notwithstanding the cause of action arose in the county of Devon, upon being satisfied upon affidavit that, on the score of saving expense, or some manifest convenience, it was proper that the trial should take place in Middlesex. In the present case the judge at chambers, on certain objections being made on behalf of the Attorney General for the Prince, referred the application to the Court.

Accordingly, in the last term, Mr. Meadows White, on the part of the defendant, obtained a rule to change the venue to Devon, against which cause was shewn in the first instance by Mr. Karslake and Mr. Garth, on behalf of the Attorney General. It was contended that the Court had no power to change the venue in this case, that the Attorney General of the Prince of Wales, Duke of Cornwall, is, in cases affecting the rights of the duchy, in the same position as the Attorney General for the Crown, and that they both have the right, not only to lay the venue where they please, but to keep it there. It was further contended, that the application of a defendant by motion to change the venue, arose upon the equity of the statutes of Rich. 2, and Hen. 5, and that these statutes did not bind the Crown, the Crown not being named therein: see the judgment of this Court, delivered by Parke, B., in the case of *Attorney General v. Lord Churchill* (1), where the origin of the practice of changing the venue in actions is explained; see also Tidd's Practice (9th ed.), vol. i. p. 601. It was further contended that the statutes applied to actions only, and not to informations.

We are agreed that it is for the officers of the Crown to make out clearly the prerogative, in any case where they claim to be on a different footing from the subject, as regards procedure in any litigation. This was in effect laid down in the case before referred to, viz. *The Attorney General v. Lord Churchill*. (2) We think that, though the Attorney General for the Crown may not have a

(1) 8 M. & W. at p. 193.

(2) 8 M. & W. 171.

right in all cases not only to lay, but also to retain, the venue where he pleases, that in an information such as the present, which is a suit in the nature of a transitory action, he would have the right.

It would not necessarily follow that the Attorney General for the Prince of Wales would have the same right. The authorities cited to us to shew that he would were—*The Attorney General v. The Mayor of Plymouth* (1); *The Attorney General to the Prince of Wales v. St. Aubyn* (2); Rules on the revenue side of the Exchequer, June, 1860 (rule 140), November, 1861, and November, 1863; and the Crown Suits Act, 28 & 29 Vict. c. 104. *Rowe v. Brenton* (3) was also referred to.

We think that, in this case, the Attorney General to the Prince of Wales must be taken to be in the same situation as the Attorney General to the Crown. But it does not appear to us absolutely necessary in the present case to decide whether, in the case of an information such as the present, if filed by the Crown, the Crown would have a right to lay and keep the venue where it pleased; nor whether, if as against the Crown, the venue could not be changed on motion, the Crown not being bound by the statutes and practice referred to, the same rule would apply to the Attorney General for the Prince.

For the case was argued before us on the ground of convenience, as well as on the points we have noticed. The facts on which the argument as to convenience or inconvenience proceeded were not stated on affidavit, at least no affidavit has been filed, but were referred to by the counsel on each side with the sanction of the other. For the defendant, was urged upon us the inconvenience and expense of bringing up witnesses from Torquay to London to attend the trial. On the other hand, it is clear from the facts stated to us by the counsel for the Attorney General, and not disputed by the defendant's counsel, that the question to be tried must depend, to a considerable degree, upon documents and records, which would be produced by the officer of the Duchy no doubt more conveniently in Middlesex and London; nor was it disputed by the defendant's counsel that the Attorney General

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(1) Wigh. 134. (2) Wigh. 167. (3) 3 M. & R. 133; 8 B. & C. 737.

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might allege such an interest in the Crown as to entitle him to appear and claim a trial at bar.

The inconvenience of bringing a Devonshire jury to Middlesex for a trial at bar at Westminster would be great, and would go a long way to counterbalance the inconvenience of many of the witnesses residing at Torquay. We think, then, that the Court ought not to interfere to change the venue, and that the rule should be discharged.

BRAMWELL, B. I wish to add, that in my opinion, when the nature of the application is looked at, no question of prerogative arises. The application was made and was insisted on, upon grounds of convenience, and the Crown, though it asserts its right absolutely, yet also says that it would be more convenient to try the cause in London. As far as I can judge, the balance of convenience is not such that we should interfere with the right of the plaintiff to try where he pleases. But, without more consideration I should be sorry to lay down the rule that the Crown has, in every such case, a right to lay and keep the venue where it will.

Rule discharged without costs.

Attorney for the Prince of Wales: *A. G. Lloyd (Solicitor to the Duchy of Cornwall).*

Attorneys for defendant: *W. & H. P. Sharp.*

END OF VOL. I.

REGULÆ GENERALES.

EASTER TERM, 1866.

RULES OF COURT FOR REGULATING THE PROCEDURE AND PRACTICE IN SUITS BY ENGLISH INFORMATION.

The Right Honourable Sir FREDERICK POLLOCK, Knight, Lord Chief Baron of Her Majesty's Court of Exchequer, and Sir SAMUEL MARTIN, Knight, Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knight, Sir WILLIAM FRY CHANNELL, Knight, and Sir GILLERY PIGOTT, Knight, Barons of the same Court, do hereby, in pursuance and execution of the power given them by "The Crown Suits, &c., Act, 1865," and of every or any other power or authority enabling them in this behalf, order and direct in manner following :

RULE I.

Printing of Informations.

1. *Consolidated Chancery Orders*, IX. 3, p. 37.—Informations shall be printed on cream wove machine drawing foolscap folio paper, 19 lbs. per mill ream, in pica type, leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two and a half inches wide, and dates and sums occurring therein shall be expressed in figures instead of words. Every information shall be divided into paragraphs, numbered consecutively.

2. *Ib.* XL. 19, and p. 199, *Rule 4.*—*Ib.* p. 132.—The payment to be made by a defendant for such printed copies of the information as he requires, shall be at the rate of one halfpenny per folio of 72 words.

RULE II.

Service of Copy of Information and Appearance.

1. *Ib.* X. 3.—Where a defendant within the jurisdiction of the Court is served with a copy of an information in manner provided by “The Crown Suits, &c., Act, 1865,” he must appear thereto within eight days after the service of such copy.

2. *Ib.* X. 4.—Where any defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, is, when within the jurisdiction of the Court, duly served with a copy of the information, in manner provided by “The Crown Suits, &c., Act, 1865,” and refuses or neglects to appear thereto within eight days after such service, the informant may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the Queen’s Remembrancer to enter an appearance for such defendant, and, no appearance having been entered, the Queen’s Remembrancer shall enter such appearance accordingly, upon being satisfied by affidavit that the copy of the information was duly served; and after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the Queen’s Remembrancer is not hereby required to enter such appearance, the informant may apply to the Court or a Judge for leave to enter such appearance for such defendant, and the Court or Judge being satisfied that the copy of the information was duly served, and that no appearance has been entered for such defendant, may, if it seem fit, order the same accordingly.

3. *Ib.* X. 5.—Any appearance entered at the instance of the informant for a defendant, who at the time of the entry thereof is an infant or a person of weak or unsound mind, unable of himself to defend the suit, shall be irregular and of no validity.

4. *Ib.* VII. 13.—Where, upon default made by a defendant in not appearing to or not answering an information, it appears to the Court or a Judge that such defendant is an infant or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the Court or a Judge may,

upon the application of the informant, order that some proper person be assigned guardian of such defendant, by whom he may appear to and answer or appear to or answer the information and defend the suit. But no such order shall be made unless it appears on the hearing of such application that a copy of the information was duly served in the manner provided by "The Crown Suits, &c., Act, 1865," and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the information, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such copy of the information, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian of such infant, unless the Court or Judge at the time of hearing such application shall dispense with such last-mentioned service.

5. *Ib.* X. 6.—Where the Court or a Judge is satisfied by sufficient evidence that any defendant has been within the jurisdiction of the Court at some time not more than two years before the information was filed, and that such defendant is out of the jurisdiction, or that upon inquiry at his usual place of abode (if he had any), or at any other place or places where at the time when the information was filed he might probably have been met with, he could not be found, so as to be served with a copy of the information, and that in either case there is just ground to believe that such defendant has gone out of the jurisdiction, or otherwise absconded to avoid being served with such copy of the information or with other process, the Court or a Judge may order that such defendant do appear at a certain day, to be named in the order, and a copy of such order, together with a notice to the effect set forth at the end of this clause, may within fourteen days after such order made be inserted in the *London Gazette*, and be otherwise published as the Court or a Judge may direct; and where the defendant does not appear within the time limited by such order, or within such further time as the Court or a Judge may appoint, then, on proof made of such publication of the order, the Court or a Judge may

order an appearance to be entered for the defendant, on the application of the informant.

“NOTICE.—*A. B.* Take notice, that if you do not appear, pursuant to the above order, the informant may enter an appearance for you, and the Court may afterwards grant to the informant such relief as he may appear to be entitled to on his own shewing.”

6. *Ib.* X. 7.—Where a person named as a defendant to an information is out of the jurisdiction of the Court :

- (1.) The Court or a Judge, upon application supported by sufficient evidence in what place or country such defendant is or may probably be found, may order that a copy of the information, and, if an answer is required, a copy of the interrogatories may be served on such defendant in such place or country, or within such limits, as the Court or Judge shall think fit to direct.
- (2.) Such order shall limit a time after such service, within which such defendant is to appear to the information, such time to depend on the place or country within which the copy of the information is to be served ; and where an answer is required, such order shall also limit a time within which such defendant is to plead, answer, or demur, or obtain further time to make his defence to the information.
- (3.) At the time when such copy of the information shall be served, the informant shall also cause such defendant to be served with a copy of the order giving the informant leave to serve such copy of the information.
- (4.) And if upon the expiration of the time for appearing it be shewn to the satisfaction of the Court or a Judge that such defendant was duly served with such copy of the information, and with a copy of the order, the Court or Judge may, upon the application of the informant, order an appearance to be entered for such defendant.

7. *Ib.* X. 9.—A defendant, notwithstanding that an appearance may have been entered for him by the informant, may afterwards enter an appearance for himself in the ordinary way, but such ap-

pearance by such defendant shall not affect any proceeding duly taken, or any right acquired by the informant under or after the appearance entered by him, or prejudice the informant's right to be allowed the costs of the first appearance.

8. *Ib.* III. 5.—Every party defending in person shall cause to be written or printed upon every demurrer, plea, answer, or other pleading or proceeding, and upon all instructions which he may leave at the Queen's Remembrancer's office for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall be more than three miles from the Queen's Remembrancer's office) another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, and other documents, proceedings, and written communications, may be left for him.

RULE III.

Amendment of Informations.

1. *Ib.* IX. 18.—Where in amending an information no addition or insertion of more than 180 words in any one place is made, the information may be amended by written alterations in the printed information which has been filed, and by written additions on paper to be interleaved therewith, if necessary, but in all other cases the amendment must be made by a reprint of the information.

2. The practice of amending a defendant's copy of the information shall, with respect to informations filed after these rules come into operation, be abolished.

3. *Ib.* IX. 20.—A copy of an amended information, whether upon an amendment by a reprint, or by such alterations and additions as mentioned in the first clause of this rule, shall be served upon the defendant or his solicitor, and such copy may be partly printed and partly written, if the amendment is not made by a reprint: and in every case the copy to be served shall be first so marked by the proper officer of the Court as to indicate the filing of such amended information, and the date of the filing or amendment thereof.

4. *Ib.* IX. 21.—Where a defendant defends by a solicitor, ser-

vice upon such solicitor of a copy of the amended information, whether wholly printed or partly printed and partly written, shall be good service on such defendant.

5. *Ib.* IX. 22.—Where a defendant defends in person, service at the address for service of such defendant of a copy of the amended information, whether wholly printed or partly printed and partly written, shall be good service on such defendant.

RULE IV.

Interrogatories.

1. *Ib.* XI. 2.—Where the informant requires an answer to an information from any defendant or defendants thereto, the interrogatories for the examination of such defendant or defendants shall be filed within eight days after the time limited for the appearance of such defendant or defendants.

2. *Ib.* XI. 3.—After the expiration of eight days from the time limited for the appearance of any defendant, no interrogatories shall be filed for the examination of such defendant without the special leave of the Court or of a Judge, granted upon hearing the parties.

3. *Ib.* XI. 4.—Where a defendant required to answer appears in person or by his solicitor within the time limited for that purpose by the rules of the Court, the informant shall, within eight days after the time allowed for such appearance, deliver to such defendant or to his solicitor a copy of the interrogatories so filed as aforesaid, or of such of them as the particular defendant is required to answer; and the copy so to be delivered shall be examined with the original by the Clerks of the Queen's Remembrancer, and they, on finding that the same is properly written, shall mark the same as an office copy.

4. *Ib.* XI. 5.—Where a defendant to a suit does not appear in person or by his own solicitor within the time allowed for that purpose by the rules of the Court, and the informant files interrogatories for his examination, the informant may deliver a copy of such interrogatories so examined and marked as aforesaid to such defendant, at any time after the time allowed to such defendant to appear, and before his appearance in person or by his own solicitor,

or the informant may deliver a copy of such interrogatories so examined and marked as aforesaid to the defendant or his solicitor after the appearance of such defendant in person or by his solicitor, but within eight days after such appearance.

RULE V.

Times allowed in Procedure.

1. *Ib.* XXXVII. 3.—A defendant may demur alone to an information within twelve days after his appearance thereto, but not afterwards.

2. *Ib.* XXXVII. 4.—A defendant required to answer an information, whether original or amended, must put in his plea, answer, or demurrer thereto, not demurring alone, within twenty-eight days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer, or within such further time as the Court or a Judge may allow.

If he does not he is subject to the following liabilities:

- (1.) An attachment may be issued against him.
- (2.) If the sheriff takes the defendant under the attachment, and accepts bail, and makes his return accordingly, the informant may, by motion of course, obtain an order directed to the Tipstaff of Her Majesty's Court of Exchequer, to bring the defendant to the bar of the Court, and upon the defendant's being brought to the bar of the Court, the Court may, if it think fit, absolutely commit him to Whitecross Street Prison until he has put in his answer.
- (3.) If the sheriff, under the attachment, arrests the defendant, and sends him to prison, or, finding him already in custody, detains him, and makes his return accordingly, the informant may, by motion of course, obtain a writ of *habeas corpus* to bring the defendant to the bar of the Court, and upon the defendant's being so brought to the bar of the Court, the Court may, if it think fit, absolutely commit him to Whitecross Street Prison, until he has put in his answer.
- (4.) The informant may file a traversing note, or proceed to have the information taken *pro confesso* against the defendant

3. *Ib.* XXXVII.—A defendant who is served with a copy of an information, whether original or amended, and is not required to answer the same, may, without any leave of the Court or a Judge, put in a plea, answer, or demurrer, not demurring alone, within fourteen days after the expiration of the time within which he might, if required to answer, and appearing within the time limited for his appearance, have been served with interrogatories for his examination in answer to the information.

4. *Ib.* XXXVII. 6.—Where a defendant is ordered to answer amendments and exceptions together, he must put in his further answer and his answer to the amendments within fourteen days after he shall have been served with interrogatories for his examination in answer to the amended information, or within such further time as the Court or Judge may allow. If he does not he is subject to the same liabilities as are mentioned in the second clause of this rule.

5. The answer of a defendant shall be deemed sufficient :

- (1.) Where no exceptions for insufficiency are filed thereto within six weeks after the filing of such answer.
- (2.) Where exceptions being filed the informant does not set them down to be argued in the term next following the filing of such exceptions.
- (3.) Where a further answer is filed, and the whole exceptions are not set down to be argued in the term next following the filing of such further answer.

6. *Ib.* XXXIII. 2.—Unless the Court or a Judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and a day named in the notice for hearing the motion. And in the computation of such two clear days, Sundays and other days in which the Queen's Remembrancer's Office is closed, shall not be reckoned.

7. The times limited in this and the others of these rules shall apply both to town and country causes, and in all cases not provided for by these rules the times in all causes shall be the same as those heretofore allowed in town causes.

RULE VI.

Printing of Answers.

1. *Chancery Order of 6th March, 1860.*—The practice of engrossing answers on parchment shall henceforth be discontinued, and a defendant (except as otherwise provided by the fifth clause of this rule) is to file his answer divided into paragraphs, numbered consecutively, and written bookwise upon paper of the same size and description as that on which informations are printed.

2. At the time when defendant files his answer he is to leave with the Queen's Remembrancer a fair copy thereof (without the schedules, if any, of accounts or documents), and the Clerks of the Queen's Remembrancer are to examine and correct such copy with the answer filed, and return it so examined, with a certificate thereon that it is correct and proper to be printed.

3. A defendant is then to cause his answer to be printed from such certified copy on paper of the same size and description, and in the same type, style, and manner, on and in which informations are required to be printed, and before the expiration of four days from the filing of his answer is to leave a printed copy thereof with the Queen's Remembrancer, with a written certificate thereon by the defendant's solicitor, or by the defendant if defending in person, that such print is a true copy of the copy of the answer so certified, and if such printed copy shall not be so left, the defendant shall be subject to the same liabilities as if no answer had been filed.

4. At any time after the expiration of such four days, the defendant, within forty-eight hours after the same shall have been demanded in writing, is to have ready for delivery to the informant an official and certified printed copy of the answer.

5. Notwithstanding the preceding clauses of this rule, a defendant is to be at liberty to swear to and file a printed answer.

6. On receiving from the informant a demand for an official and certified printed copy of the answer, the defendant is to get a printed copy thereof examined by the Clerks of the Queen's Remembrancer with the answer as filed, and to stamp such copy with a stamp for 5s.; and the Clerks of the Queen's Remem-

brancer, on finding that such copy is duly stamped and correct, are to certify thereon that the same is a correct copy, and to mark the same as an office copy.

7. Such copy is, on demand, to be delivered to the informant, who, on receipt thereof, is to pay to the defendant the amount of the stamp thereon, and at the rate of 4*d.* per folio for the same.

8. The informant is also to be entitled to demand and receive from the defendant any additional number of printed copies of his answer not exceeding ten, on payment for the same at the rate of one halfpenny per folio.

9. After all the defendants who are required to answer shall have filed their answers, a co-defendant is to be entitled to demand and receive from any other defendant any number of printed copies of his answer, not exceeding six, on payment for the same at the rate of one halfpenny per folio.

10. Office copies of schedules to answers of accounts or documents are to be obtained according to the practice now existing for obtaining office copies of answers.

11. The Clerks of the Queen's Remembrancer are not to certify or mark any printed copy of an answer which has any alteration or interlineation in writing.

12. No costs are to be allowed for any written brief of an answer, unless the Court or a Judge shall direct the allowance thereof.

13. The clauses of this rule, other than Clause 1, are not to apply to answers filed by defendants defending in *formâ pauperis*.

RULE VII.

Taking Informations pro Confesso.

1. *Consolidated Chancery Orders*, XXII.—Upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the informant may cause such defendant to be served with a notice of motion to be made on some day in the following term, not less than fourteen days after the day of such service, that the information may be taken *pro confesso* against such defendant, and thereupon, unless such defendant has in the meantime put in his answer to the infor-

mation, or obtained further time to answer the same, the Court, if it so think fit, may order the information to be taken *pro confesso* against such defendant, either immediately, or at such time, and upon such terms, and subject to such conditions, as under the circumstances of the case the Court shall think proper.

2. Where any defendant, whether within or not within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the informant is unable with due diligence to procure a writ of attachment, or any subsequent process for want of answer to be executed against such defendant by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant shall, for the purpose of enabling the informant to obtain an order to take the information *pro confesso*, be deemed to have absconded to avoid or to have refused to obey the process of the Court.

3. Where any defendant who, under the second clause of this rule, may be deemed to have absconded to avoid or to have refused to obey the process of the Court, appears in person or by his own solicitor, the informant may serve upon such defendant or his solicitor a notice that on a day in such notice named (being not less than fourteen days after the service of such notice) the Court will be moved that the information may be taken *pro confesso* against such defendant: and the informant must, upon the hearing of such motion, satisfy the Court that such defendant ought, under the provisions of the second clause of this rule, to be deemed to have absconded to avoid or to have refused to obey the process of the Court; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken *pro confesso* against such defendant, either immediately or at such time or upon such further notice as under the circumstances of the case the Court may think proper.

4. Where any defendant who, under the second clause of this rule, may be deemed to have absconded to avoid or to have refused to obey the process of the Court, has had an appearance entered for him under the second, fifth, or sixth clause of Rule II., and does not afterwards appear in person or by his own solicitor, the informant may cause to be inserted in the *London Gazette* a notice that on a day in such notice named (being not less than four weeks

after the first insertion of such notice in the *London Gazette*) the Court will be moved that the information may be taken *pro confesso* against such defendant, and the informant must upon the hearing of such motion satisfy the Court that such defendant ought, under the provisions of the second clause of this rule, to be deemed to have absconded to avoid or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the *London Gazette* at least once in every entire week (reckoned from Sunday morning to Saturday evening) which shall have elapsed between the time of the first insertion thereof and the time for which the said notice is given; and the Court, if so satisfied, and if an answer has not been filed, may, if it so think fit, order the information to be taken *pro confesso* against such defendant, either immediately, or at such time, or upon such further notice, as under the circumstances of the case the Court may think proper.

5. Any defendant being in custody for want of his answer and submitting to have the information taken *pro confesso* against him, may apply to the Court upon motion, with notice to be served on the informant, to be discharged out of custody, and thereupon the Court may order the information to be taken *pro confesso* against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears, from the nature of the informant's case, or otherwise to the satisfaction of the Court, that justice cannot be done to the informant without discovery or further discovery from such defendant.

6. No cause in which an order is made that an information be taken *pro confesso* against a defendant, shall be heard on the same day on which the order is made, but the cause shall be set down to be heard, and the Court, if it so think fit, may appoint a special day for the hearing thereof.

7. A defendant against whom an order to take an information *pro confesso* is made may appear at the hearing of the cause, and where he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the information.

8. Upon the hearing of a cause in which an information has been ordered to be taken *pro confesso*, such decree shall be made

as to the Court shall seem just; and in the case of any defendant who has appeared at the hearing, and waived all objection to such order to take the information *pro confesso*, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on him, or after the execution of a writ of attachment against him, the decree shall be absolute.

9. In pronouncing the decree the Court may, either upon the case stated in the information, or upon that case and a motion by the informant for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant against whom the information has been ordered to be taken *pro confesso* to be appointed, with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appear to be just) direct payment to be made out of such real or personal estate of such sum of money as at the hearing or any subsequent stage of the cause the informant shall appear to be entitled to.

10. A decree founded on an information taken *pro confesso* is to be entered as other decrees.

11. After a decree founded on an information taken *pro confesso* has been entered, an office copy thereof shall (unless the Court shall dispense with service thereof) be served on the defendant against whom the order to take the information *pro confesso* was made, or his solicitor; and where the decree is not absolute, under the eighth clause of this rule, such defendant or his solicitor shall be at the same time served with a notice to the effect that if such defendant desires permission to answer the informant's information, and set aside the decree, application for that purpose must be made to the Court within the time specified in the notice, or that otherwise such defendant will be absolutely excluded from making any such application.

12. Where such notice as is mentioned in the last preceding clause of this rule is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant shall be fourteen clear days after the service of such notice, or in case the Court be not sitting at the expiration of such fourteen clear days, then on the first day of the term next following the expiration of such fourteen clear days; but where such notice is to be served out of the jurisdiction of the Court such

time shall be specially appointed by the Court, on the *ex parte* application of the informant.

13. No proceeding shall be taken, and no receiver appointed under the decree, nor any sequestrator under any sequestration issued in pursuance thereof, shall take possession of or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process shall issue to compel performance of the decree, without leave of the Court or a Judge, to be obtained after notice served on such defendant or his solicitor, unless the Court or a Judge shall dispense with such service.

14. Any defendant waiving all objection to take the information *pro confesso*, and submitting to pay such costs as the Court may direct, may before enrolment of the decree have the cause re-heard upon the merits stated in the information, the petition for re-hearing being signed by counsel as other petitions for re-hearing.

15. Where a decree is not absolute, under the eighth clause of this rule, the Court may order the same to be made absolute, on the motion of the informant made :

- (1.) After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.
- (2.) After the expiration of the time limited by the notice provided for by the eleventh clause of this rule, where the decree has been served without the jurisdiction.
- (3.) After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof.

And such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may, on the hearing of such motion, allow to the defendant for moving for leave to answer the information.

16. Where the decree is not absolute, under the eighth clause, and has not been made absolute under the fifteenth clause of this rule, and the defendant has a case upon merits not appearing in the information, he may apply to the Court by motion supported by an affidavit stating such case, and submitting to such terms with respect to costs and otherwise as the Court may think reason-

able for leave to answer the information ; and the Court, if satisfied that such case is proper to be submitted to the judgment of the Court, may, if it think fit and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the information ; and where permission is so given to put in an answer, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had as if the decree had not been made and no proceedings against such defendant had been had in the cause.

17. The rights and liabilities of any defendant under a decree made upon an information taken *pro confesso* shall extend to the representatives of any deceased defendant, and to any persons claiming under any person who was defendant at the time when the decree was pronounced ; and with reference to the altered state of parties and any new interests acquired, the Court may, upon motion served in such manner and supported by such evidence as under the circumstances of the case the Court may deem sufficient, permit such proceedings to be taken as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered, and the right of the parties duly ascertained and determined.

RULE VIII.

Traversing Note.

1. *Consolidated Chancery Orders*, XIII. 1.—After the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to any information, whether original or amended before answer, which he has been required to answer, if such defendant has not filed any plea, answer, or demurrer, the informant may, if he think fit, file a note at the Queen's Remembrancer's office to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed an answer traversing the case made by the information."

2. *Id.* 2.—After the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to an

information amended after answer, which he has been required to answer, if such defendant has not filed any plea, answer, or demurrer, the informant may, if he think fit, file at the Queen's Remembrancer's Office a note to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed an answer traversing the allegations introduced into the information by amendment."

3. *Ib.* 3.—After the expiration of the time allowed to a defendant to put in his further answer to any information, if such defendant shall not have put in any further answer, the informant may, if he think fit, file at the Queen's Remembrancer's office a note to the following effect:—"The informant intends to proceed with the cause as if the defendant had filed a further answer traversing the allegations in the information whereon the exceptions are founded."

4. *Ib.* 4.—Where a demurrer or plea to the whole information is overruled, the informant, if he does not require an answer, may, if he think fit, immediately file his note in manner directed by the first or second clause of this rule, as the case may require, and with the same effect, unless the Court, upon overruling such demurrer or plea, gives time to the defendant to plead, answer, or demur, and in such case, if the defendant does not file any plea, answer, or demurrer, within the time so allowed by the Court, the informant, if he does not then require an answer, may, if he think fit, on the expiration of such time, file such note.

5. *Ib.* 5.—A traversing note having been filed, a copy thereof shall be served on the defendant against whom the same was filed.

6. *Ib.* 6.—The filing of a traversing note, and due service of a copy thereof, shall have the same effect as if the defendant against whom such note is filed had filed a full answer, or further answer, traversing the whole information, or those parts of it to which the note relates, on the day on which the note was filed.

7. A defendant, after service of the copy of the traversing note filed against him as aforesaid, shall not plead, answer, or demur to the information, or put in any further answer thereto, without the special leave of the Court or a Judge, and the cause shall stand in the same situation as if such defendant had filed a full answer or further answer to the information on the day on which the note was filed.

RULE IX.

Replication and Joining Issue.

1. *Ib.* XVII. 2.—No subpoena to rejoin shall hereafter be issued, and only one replication shall be filed in each cause unless the Court or a Judge shall otherwise direct, and the replication shall be in the form set forth at the end of this rule, or as near thereto as circumstances admit, and upon the filing of such replication the cause shall be deemed to be completely at issue, and each defendant may, without any rule or order, proceed to verify his case by evidence, and the informant may in like manner proceed to verify his case by evidence, as soon as notice of the replication having been filed has been duly served on all the defendants who have filed an answer or plea, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the information.

Form of Replication.

Between informant and defendant.

The informant hereby joins issue with the defendants [*all the defendants who have answered or pleaded, or against whom a traversing note has been filed, or who have not been required to answer, and have not answered the information*], and will hear the cause on information and answer against the defendants [*all the defendants against whom the cause is to be heard on information and answer*], and on the order to take the information *pro confesso* against the defendants [*all the defendants against whom the information is to be taken pro confesso*.]

RULE X.

Evidence.

1. *Consolidated Chancery Orders, Sect. VIII.* 15 & 16 *Vict. c. 26, s. 28.*—The mode of examining witnesses now in force, and all the practice of the Court in relation thereto, so far as the same are inconsistent with these rules, shall, from and after the time appointed for these rules to come into operation, be abolished: pro-

vided always, that the Court or a Judge may, if it shall seem fit, order any particular witness or witnesses within the jurisdiction of the Court, or any witness or witnesses out of the jurisdiction of the Court, to be examined upon interrogatories in the mode now in force, or in such other mode as the Court or a Judge may direct; and that with respect to such witness or witnesses the practice of the Court in relation to the examination of witnesses shall continue in force, save only so far as the same may be varied by any order of the Court or a Judge in reference to any particular case.

2. *Chancery Order, 5th February, 1861, Rule 3.*—The informant or any defendant may, at any time within fourteen days after issue has been joined in a cause, apply to a Judge by a summons to be served on the opposite party for an order that the evidence as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken *vivâ voce* at the hearing of the cause, and the Judge may, if he shall so think fit, make an order that the evidence as to such facts and issues, or any of them, shall be taken *vivâ voce* at the hearing accordingly; and the facts and issues as to which any such orders shall direct that the evidence shall be taken *vivâ voce* at the hearing shall be distinctly and concisely specified in such order. And where any such order shall have been made, the examination in chief, as well as the cross-examination and re-examination, shall be taken before the Court at the hearing as to the facts and issues specified in such order; and no affidavit shall be admissible at the hearing in respect of any fact or issue which shall be included in any such order as aforesaid.

3. Except as to facts or issues included in any order directing evidence to be taken *vivâ voce* at the hearing under the first clause of this rule, each party shall be at liberty to verify his case by affidavit.

4. A Judge may, if he think fit, upon the application of either party, by summons served on the opposite party, order that any particular witness or witnesses shall be examined orally before an examiner specially appointed by the Judge for that purpose, whether the evidence of such witness or witnesses relate to any facts and issues specified in an order under the second clause of this rule or not; and witnesses so examined shall be subject to

cross-examination and re-examination ; and such examination, cross-examination, and re-examination shall be conducted as nearly as may be in the mode now in use in Courts of Common Law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause, but subject to such directions as may be given by the Judge in any particular case.

5. *Chancery Order, 5th February, 1861, Rule 5 ; Exchequer Rules, 1860, 119.*—The evidence in chief on both sides in any cause taken before the hearing, to be used at the hearing (including the examination, cross-examination, and re-examination of any witness before a special examiner, under any such order as mentioned in the last preceding clause of this rule), shall be closed within eight weeks after issue joined, unless the time is enlarged by special order ; and no evidence subsequently taken shall be admissible without special leave of the Court or a Judge.

6. *Consolidated Chancery Orders, XVIII. 1 ; and Exchequer Rules, 1860, 121.*—All affidavits made in a cause, whether for the purpose of being used at the hearing or otherwise, shall be taken and expressed in the first person of the deponent, and all affidavits shall be filed in the Queen's Remembrancer's office ; and affidavits to be used at the hearing of a cause shall be so filed before the time of closing evidence.

7. *15 & 16 Vict. c. 86, s. 37.*—Every affidavit in a cause shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject.

8. *Consolidated Chancery Orders, XIX. 12.*—No affidavit filed before issue joined in any cause shall, without special leave of the Court or a Judge, be received at the hearing thereof, unless within one month after issue joined notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

9. *Chancery Orders, 5th February, 1861, Rule 19.*—Where any party has filed an affidavit intended to be used at the hearing of a cause, any opposite party desiring to cross-examine the witness who has made such affidavit may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the witness for cross-examination before the Court

at the hearing, such notice to be served within fourteen days next after closing the evidence: but a Judge, on the application of the party filing such affidavit, by summons served on the opposite party, may, if the circumstances of the case in his opinion render it expedient, make an order giving the party filing such affidavit liberty to produce such witness for cross-examination at a time named in such order, before an examiner specially appointed by the Judge, instead of at the hearing. Unless such witness is produced accordingly at the hearing, or, if such order as last aforesaid has been made, then at the time named in such order, such affidavit shall not be used as evidence without the leave of the Court. The party producing such witness shall be entitled to demand the expenses thereof in the first instance from the party requiring such production, but such expenses shall ultimately be borne as the Court shall direct. The witness, when produced and cross-examined, shall be subject to oral re-examination on behalf of the party by whom his affidavit was filed.

10. *Chancery Orders, 5th February, 1861, Rule 20.*—Where any such notice as is mentioned in the last preceding clause is given, the party to whom it is given shall be entitled to compel the attendance of the witness for cross-examination, in the same way as he might compel the attendance of a witness to be examined on his behalf.

11. The attendance of a witness, whether before the Court or a special examiner, may be compelled, either by an order of a Judge, in the same manner as in Courts of Common Law, or by a *subpœna ad testificandum*, or *subpœna duces tecum*, which may be in the form mentioned at the foot of this rule, with such variations as circumstances may require.

12. 15 & 16 *Vict. c. 86, s. 34.*—When the examination or cross-examination of witnesses before a special examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Queen's Remembrancer's office, to be there filed.

13. *Chancery Order, 5th February, 1861, Rule 22.*—Any party to a cause requiring the attendance of any person before the Court for the purpose of being examined, shall give to the opposite party forty-eight hours' notice at least of his intention to examine such

witness or person, such notice to contain the name and description of the person, unless the Court or a Judge shall in any case think fit to dispense with such notice.

14. 15 & 16 *Vict. c. 86, s. 29*.—Upon the hearing of any cause, the Court, if it shall see fit to do so, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party to be paid in such manner as it may think fit.

15. *Ib. 41*.—In cases where it shall be necessary for any party to go into evidence subsequently to the hearing of a cause, such evidence may be taken by affidavit, but subject to any special directions which may be given by the Court or a Judge in any particular case.

16. *Chancery Order, 6th March, 1860*.—Affidavits to be filed in the office of the Queen's Remembrancer, whether for the purpose of being used on an interlocutory application, or at the hearing of a cause, or otherwise, are to be written on foolscap paper bookwise: provided nevertheless, that the Queen's Remembrancer may receive and file affidavits written otherwise than as here directed, if, in his opinion, the circumstances of the case render such reception and filing desirable or necessary.

17. 15 & 16 *Vict. c. 86, s. 59*.—Upon applications by motion to the Court in any suit depending therein for an injunction, or to dissolve an injunction, the answer of the defendant shall, for the purpose of evidence on such motions, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto.

Form of Subpoena referred to in Clause 11 of the preceding Rule.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. We command you [and every of you], That all excuses ceasing, you do personally be and appear before [Our trusty and well-beloved the Barons of our Court of Exchequer at Westminster, at such times as the bearer hereof shall by notice in writing appoint,] [*or* an examiner specially appointed for the examination of witnesses in our Exchequer, at such times and

places as the bearer hereof shall by notice in writing appoint], to testify the truth according to your knowledge in a certain cause depending in our said Court of Exchequer, wherein is informant [and plaintiff, or and and others are plaintiffs], and [and others or another] is [or are] defendant [or defendants] on the part of the [and that you then and there bring with you and produce], and hereof fail not at your peril.

Witness, &c.

RULE XI.

Setting down for Hearing.

1. *Consolidated Chancery Orders*, XXI. 1.—Within eight weeks after the evidence has been closed, the informant is to set down the cause, and obtain and serve on the solicitor of the defendant, or upon the defendant if defending in person, a subpoena to hear judgment. If he does not, any defendant, after the expiration of such eight weeks, may set the cause down, and may obtain a subpoena to hear judgment, and serve the same on the solicitor of the informant, and on the other defendants, if any.

2. *Ib.* 5.—A subpoena to hear judgment must be served at least ten days before the return thereof.

3. A subpoena to hear judgment shall be in the form next hereinafter set forth, with such variations as circumstances may require.

Subpœna to hear Judgment.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith : To greeting. We command you [and every of you] that you appear before the Chancellor and Barons of our Exchequer at Westminster, on the day of or whenever thereafter a certain cause now depending in our Court of Exchequer at Westminster, wherein is informant [and plaintiff], and is defendant [or, are defendants], shall come on for hearing, then and there to receive and abide by such judgment and decree as

shall then or thereafter be pronounced, upon pain of judgment being pronounced against you by default.

Witness at Westminster, the day of ,
 in the year of our Lord One thousand eight hundred and
 sixty

RULE XII.

Decrees, Rules, and Orders.

1. *Ib.* XXIII. 2.—It shall not be necessary in drawing up any decree to recite any of the pleadings or any previous proceeding beyond the prayer of the information, but it shall be sufficient to refer thereto; save only that in cases involving special circumstances as the Court or a Judge shall direct, or the Queen's Remembrancer shall in his discretion think fit, such short recitals may be inserted as may be necessary to shew the grounds on which the decree is granted.

2. *Rules of 26th November, 1861.*—All rules at side bar, and orders on motion of course, shall bear date on the day they are drawn up.

3. *Rule of 22nd June, 1860.*—All rules upon the sheriffs of London or Middlesex to return writs shall be four-day rules, and upon other sheriffs eight-day rules.

4. *Rule 114.*—The writ heretofore used calling upon a party to perform a rule, order, or decree, shall not be necessary or used to bring such party into contempt, but the serving of a copy of the rule, order, or decree, or the copy of an office copy of such rule, order or decree, shall be deemed sufficient service.

5. *Rule 113.*—It shall not, except in cases of attachment, be necessary to the regular service of a rule, order, or decree, that the original or office copy thereof should be shewn, unless sight thereof be demanded.

RULE XIII.

Revivor and Supplement.

1. Where an order under "The Crown Suits, &c., Act, 1865," to the effect of an order to revive or of a supplemental decree, has

been obtained, the first seven clauses of the second of these rules shall be applicable in the same manner as if such order were an information filed on the day on which such order is obtained, and to which the persons who would be defendants to an information of revivor or supplemental information were defendants.

2. *Consolidated Chancery Orders*, XXXII. 1.—Any person under no disability, or under the disability of coverture only, who may be served with any such order as mentioned in the last preceding clause, may apply to the Court or a Judge to discharge such order within twelve days after such service.

3. *Ib.*—Any person under any disability other than coverture who may be served with any such order as last aforesaid, may apply to the Court or a Judge to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such person, and until such period of twelve days shall have expired such order shall be of no effect as against such person.

4. *Ib.* 2.—Where the informant in any cause which is not in such a state as to allow of an amendment being made in the information, desires to state or put in issue any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue, by filing in the Queen's Remembrancer's office a statement, either written or printed, to be annexed to the information, and such proceedings by way of answer, evidence, and otherwise, shall be had and taken upon the statement so filed as if the same were embodied in a supplemental information.

RULE XIV.

Written Pleadings, &c.

Chancery Order, 6th March, 1860.—Pleas, demurrers, interrogatories, traversing notes, replications, supplemental statements, exceptions, and certificates, to be filed in the office of the Queen's Remembrancer, are to be written on paper of the same description and size as that on which informations are printed.

RULE XV.

Computations of Time.

1. *Revenue Side Rule 61.*—In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

2. *Rule 62.*—Christmas Day, and the three following days, and the days between the Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in the time allowed for any proceeding.

3. The period from the 10th day of August to the 24th day of October (both inclusive) shall be excluded in reckoning the time allowed for pleading, answering, or demurring to an information, and for filing exceptions to answers.

RULE XVI.

Payment of Money into Court.

1. *Exchequer Rules of 1860, 132, 133, 134.*—Any party directed by any decree or order of the Court or a Judge to pay money into Court, must apply at the office of the Queen's Remembrancer for a "direction" so to do, which direction must be taken to the Bank of England, and the money there paid in. After payment, the receipt obtained from the Bank of England must be filed at the Queen's Remembrancer's office.

2. If the money is to be invested, paid out, or otherwise disposed of, an order of the Court or a Judge must be obtained for that purpose, upon notice to the opposite party.

3. The orders relating to the matters mentioned in this rule are to be drawn up in the Queen's Remembrancer's office.

RULE XVII.

Recognizances.

1. *Exchequer Rules of 1860, 68, 71, 72.*—All recognizances, if taken and acknowledged in town, are to be taken and acknowledged before a Judge; and if a recognizance be taken and acknowledged in the country, the same may be taken and acknowledged before a Commissioner for taking special bail in the Exchequer, and in the latter case an affidavit of caption must be made and filed.

2. No enrolment of any recognizances shall be necessary, but the same shall be filed in the Queen's Remembrancer's office.

3. All recognizances are to be prepared on parchment by the respective parties entering into the same.

RULE XVIII.

Issuing Writs.

1. *Rules of Revenue Side, 1860.*—All writs in suits shall be prepared by the solicitor of the department, or by the solicitor suing out the same, and the name of the solicitor of the department, together with the name of the department, or the name and address of such other solicitor, shall be endorsed on such writ; and every such writ shall before the issuing thereof be sealed at the Queen's Remembrancer's office, and a præcipe thereof left at the said office; and thereupon an entry of every such writ, together with the date of sealing and the name of the solicitor suing out the same, shall be made in a book to be kept at the Queen's Remembrancer's office for that purpose; and all such writs shall be tested of the day, month, and year when issued, and conclude without any other words.

RULE XIX.

Distringas.

A writ of *distringas* on behalf of Her Majesty's Attorney General, or of the Attorney General of the Prince of Wales and Duke of

Cornwall, to restrain the transfer of stock transferable at the Bank of England, or the payments of the dividends thereon, shall continue to be issuable from the office of the Queen's Remembrancer in the form heretofore made, but concluding with the date of the day, month, and year of issue only.

RULE XX.

Power of Court as to Time.

1. Any power which the Court or a Judge may now possess to enlarge or abridge the time for doing any act or taking any proceeding, upon such (if any) terms as the justice of the case may require, shall not be affected by these orders.

RULE XXI.

Costs.

1. Solicitors shall be entitled to charge and be allowed the fees set forth in the schedule hereto, unless the Court shall make order to the contrary as to all or any of the parties.

2. *Exchequer Rules of 1860, 81, 82, 86.*—Where costs are to be taxed, one day's notice of taxing costs, together with a copy of the bill of costs, shall be given to the solicitor of the party whose costs are to be taxed, by the other party or his solicitor.

3. Where costs are directed to be paid to the Crown, a certificate shall be granted by the Queen's Remembrancer of the costs allowed, and on default of payment the solicitor of the department may sue out a subpoena for the payment of such costs, and on an affidavit of service thereof, and demand made, and nonpayment, an attachment may be granted.

4. A subpoena for costs shall be in the form set forth at the foot of this rule, with such variations as circumstances may require.

Subpoena for Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. We command you [and every of you], That you pay or cause to be paid immediately after the service of this writ to

or the bearer of these presents, £ costs in a
 cause wherein is informant [and plaintiff] and
 [and another, or others] is defendant [or, are defendants],
 by our Court of Exchequer adjudged to be paid by you the said
 under pain of an attachment issuing against your person,
 and such process for contempt as the said Court shall award in
 default of such payment.

Witness, &c.

RULE XXII.

Appointments.

22nd June, 1860, *Rule 139*.—On every appointment made by the Queen's Remembrancer, the party on whom the same shall be served shall attend without waiting for a second appointment, or in default thereof the Queen's Remembrancer may proceed *ex parte* on the first appointment.

RULE XXIII.

Commencement of Rules.

1. These rules shall take effect and come into operation on the 16th day of April, 1866, but nothing therein contained shall apply to any suit commenced by information filed before that day, unless the Court or a Judge shall on hearing the parties so direct.

RULE XXIV.

Interpretation.

1. In the preceding rules the following words (that is to say), "the Court," "information," "suit," and "cause," have the meanings mentioned in "The Crown Suits, &c., Act, 1865," sect. 6; and the term "a Judge" means any Judge of one of Her Majesty's Superior Courts of Law at Westminster transacting business out of Court.

2. In the preceding rules the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction (that is to say):

(1.) Words importing the singular number include the plural

number, and words importing the plural number include the singular number.

- (2.) Words importing the masculine gender include females.
- (3.) The word "party" or "parties" includes a body politic or corporate, and also includes Her Majesty's Attorney General, or the Attorney General of the Prince of Wales and Duke of Cornwall, as the case may require.
- (4.) The word "affidavit" includes affirmation.

FRED. POLLOCK.

G. BRAMWELL.

SAMUEL MARTIN.

W. F. CHANNELL.

G. PIGOTT.

March 14, 1866.

SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

<i>Instructions.</i>	£	s.	d.
For special cases, answers, examinations, demurrers, pleas, and exceptions	0	13	4
For informations	2	2	0
For amended or supplemental information	0	13	4
For brief for moving for injunction	1	1	0
For interrogatories for examination of parties or witnesses	0	13	4
For special petitions	0	13	4
For special affidavits	0	6	8
For brief in suit by information on cause coming on for hearing on service of subpoena to hear judgment	1	1	0
To defend proceedings commenced by information	0	13	4
For instructions for order to revive or add parties	0	13	4

As to informations and answers, affidavits and petitions, in lieu of the fixed fees for instructions for and for drawing, the Queen's Remembrancer is to be at liberty to take into his consideration the special circumstances of each case, and at his discretion to make such further allowance as shall appear to him to be just.

The Preparation of Pleadings and other Documents.

(The folio to be seventy-two words, and the sheet ten folios.)

For drawing informations, answers, pleas, demurrers, exceptions, interrogatories, and affidavits, per folio	0	1	0
For engrossing, per folio	0	0	4
For drawing statements and other documents for the Judges's chambers or Queen's Remembrancer, when required, including the fair copy thereof to leave in chambers, per folio	0	1	0

	£	s.	d.
For examining and correcting the proof of an information or answer, per folio	0	0	2
For revising the print of an answer before swearing or filing, per folio	0	0	2
For drawing special notice of motion	0	5	0
Or, per folio	0	1	0
For drawing such observations for counsel to accompany brief as may be necessary and proper, per sheet	0	6	8
For drawing the brief on further consideration, per sheet	0	6	8
For preparing and filing replication	0	10	0
For drawing statement on which counsel to move for order to revive or add parties, and copy	0	10	0
Or, according to circumstances, at per sheet	0	6	8
For drawing petition to revive, at per folio	0	1	0
For drawing and copying certificate to appoint guardians <i>ad litem</i>	0	6	8
For amending each copy of an information to serve where no reprint	0	13	4
For amending each brief information where no reprint	0	13	4
For drawing bills of costs, including the copy for the Queen's Remembrancer's office, per folio	0	0	8

The fee for drawing a document in all cases includes a copy, if required, for the use of the solicitor or client, or for the settlement of counsel.

Perusals.

For perusing the print of an information by the defendant's solicitors	1	1	0
If exceeding sixty folios, at per folio	0	0	4
For perusing the print of an amended information	0	13	4
If amendments exceeding forty folios, at per folio	0	0	4
For perusing an amended information when amended in writing	0	6	8
If amendments exceeding twenty folios, at per folio	0	0	4
The solicitor of the party answering interrogatories, for perusing interrogatories	0	13	4
If exceeding forty folios, at per folio	0	0	4
For perusing an answer	0	13	4
If exceeding forty folios, at per folio	0	0	4
For perusing an examination, at per folio	0	0	4
For perusing all special affidavits filed by an opposing party, at per folio	0	0	4
For perusing copy supplemental statement under Crown Suits Act	0	13	4
For perusing copy order to revive	0	13	4

Copies.

Subject to the foregoing regulations as to charges for copies, copies of all documents are to be at the rate of per folio	0	0	4
Or per sheet of ten folios at	0	3	4
Having regard to the preceding fees for perusal, the fee for abbreviating is to cease, and no close copies are now to be allowed as of course, but the allowance is to depend on the propriety of making the copy, which in each case is to be shewn and considered.			
For each copy of a summons to serve	0	2	0
For each copy of a notice of motion, order, or certificate to serve	0	1	0
Or at per folio	0	0	4

Attendances.

For attending on the Queen's Remembrancer's warrant	0	6	8
Or according to the circumstances, not to exceed per diem	2	2	0

	£	s.	d.
For attending each counsel with his brief, case, or abstract, in a suit or other proceeding in this Court	0	6	8
For the like, where the fee amounts to five guineas	0	13	4
Where it amounts to twenty guineas	1	1	0
Where it amounts to forty guineas or upwards	2	2	0
For attending to present special petition, and for same answered	0	6	8
For attending on Counsel and Court on motion of course, and for order	0	13	4
For attending on the day in which a cause or petition stands appointed for hearing, or for which notice of motion has been given	0	10	0
For attending when heard	1	1	0
Or according to circumstances, not to exceed per diem	2	2	0
For attending the Court on every special motion, when made	0	13	4
Or according to circumstances, not to exceed	1	1	0
For attending on motion for or to discharge order for injunction or other matter when heard, per diem	0	13	4
Or according to circumstances, not to exceed	1	1	0
For attending to get answer or special affidavit sworn	0	6	8
For attending examiner to procure appointment to examine witnesses	0	6	8
For attending the examination of witnesses before examiner	0	13	4
Or according to circumstances, not to exceed per diem	2	2	0
But if without counsel the fee may, at the Queen's Remembrancer's discretion, be increased to	3	3	0
For attending to settle and afterwards to read over the engrossment of an answer or examination	0	13	4
If the same exceed twenty folios and under fifty folios	1	1	0
And for each additional thirty folios	0	6	8
For attending to insert an advertisement in <i>Gazette</i>	0	6	8
For entering caveat with the Queen's Remembrancer	0	6	8
For attending to procure certificate of a caveat	0	6	8
For attending Queen's Remembrancer to certify abatement or settlement of suit, and to have same so marked in the cause book	0	6	8
For attending the printer with an information or answer to be printed	0	6	8
For attending to get copies of information or interrogatories marked for service	0	6	8
For attending to take instructions to appear, and to enter the appearance of one or more defendants, not exceeding three	0	6	8
If exceeding three, for every additional number not exceeding three	0	6	8
The solicitor of the party filing an answer, for his attendance on the Queen's Remembrancer with and for the written and printed copies of an answer, and for certifying	0	13	4
For the informant, or party having the conduct of the order, attending the Queen's Remembrancer with briefs and papers, to bespeak minutes or order, not being an order of course	0	6	8
For ditto, for preparing list of evidence read, but only when required by the Queen's Remembrancer and certified by him	0	6	8
Or according to length, at per folio	0	1	0
Attending to settle the draft of any decree or order	0	13	4
Or, at the Queen's Remembrancer's discretion, not to exceed	2	2	0
In case the Queen's Remembrancer shall certify that a special allowance ought to be made in respect of any unusual difficulty in settling an order, he is to consider the same, and make such allowance to all or any of the parties as to him shall seem just.			
For attending to procure certificate of pleadings	0	6	8
For attending to give consent to take answer without oath, and for other necessary or proper consent, of a like nature	0	6	8
For attending to procure such consents	0	6	8
For attendances in consultation or in conference with counsel	0	13	4
For attending Court on appointment of a guardian <i>ad litem</i>	0	13	4

Writs.

	£	s.	d.
For every writ of <i>subpoena duces tecum</i>	0	6	8
For a writ or writs of subpoena other than <i>subpoena duces tecum</i> , if the number of names therein shall not exceed three	0	6	8
If exceeding three names, for every additional number not exceeding three	0	6	8
For preparing every other writing without order	0	6	8
For every writ under order, except special injunction	0	13	4
For special injunction, including engrossment	1	0	0
Or per folio	0	1	4

Notices and Services.

For service of a notice of motion, exclusive of copy	0	2	6
For notice to a solicitor of appearance, answer, demurrer, plea, amendment, and replication	0	2	6
For notice of filing affidavits or set of affidavits filed, or which ought properly to have been filed together, to be read in Court	0	2	6
For notice of appointment or copy warrant for settling and passing decrees or orders before the Queen's Remembrancer			
For copy and service of a warrant on a solicitor	0	2	6
For service of a judge's summons, exclusive of the copy	0	2	6
For service of a petition	0	2	6
For judge's summons, copy and service	0	5	0
For service of an order, exclusive of the copy	0	2	6
For other necessary or proper notice	0	2	6
For services on a party or witness, such reasonable charges and expenses as may be properly incurred, according to distance, or by the employment of an agent.			

Oaths and Exhibits.

To the commissioner for oaths in London according to statute	0	1	6
In the country	0	2	6
To the solicitor, for preparing each exhibit in town and country	0	1	0
The commissioner, for making each exhibit	0	1	0

Term Fee.

For a fee term, in all causes, for every term in which a proceeding by the party shall take place	0	10	0
And for letters, per term	0	5	0
In country agency causes the further fee for letters of	0	6	8
Where no proceeding is taken which carries a term fee, a charge for letters may be allowed, if the circumstances shall require it.			
For any work or labour properly performed, and not herein provided for, such allowances are to be made as heretofore.			

* * * For REGULÆ GENERALES, pursuant to 28 Vict. c. 45, See Law Rep. 1 Q. B. 725.

THE
LAW REPORTS.

Court of Exchequer.

REPORTED BY
JAMES ANSTIE AND ARTHUR CHARLES,
BARRISTERS-AT-LAW.

EDITED BY
JAMES REDFOORD BULWER, Q.C.

VOL. II.
FROM MICHAELMAS TERM, 1866, TO TRINITY TERM, 1867,
BOTH INCLUSIVE,
XXX VICTORIA.

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1867.

JUDGES

OF

THE COURT OF EXCHEQUER,

XXX VICTORIA.

The Right Hon. Sir FITZROY KELLY, Knt., C.B.

Sir SAMUEL MARTIN, Knt.

Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.

Sir WILLIAM FRY CHANNELL, Knt.

Sir GILLERY PIGOTT, Knt.

ATTORNEYS GENERAL :

Sir WILLIAM BOVILL, Knt.

Sir JOHN BURGESS KARSLAKE, Knt.

SOLICITORS GENERAL :

Sir JOHN BURGESS KARSLAKE, Knt.

Sir CHARLES JASPER SELWYN, Knt.

ERRATA.

- Page 114, line 22 from top, *dele* "CHANNELL, B., concurred."
,, 128, bottom line, *for* "plaintiffs" *read* "defendants'."
,, 130, line 6 from top, *for* "plaintiff is" *read* "defendants are."
,, 130, " 11 " *for* "plaintiffs" *read* "defendants'."
,, 231, " 7 from bottom, *for* "defendant" *read* "plaintiff."
,, 231, " " *for* "plaintiffs" *read* "defendants'."

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DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXX VICTORIA.

NUTTALL *v.* BRACEWELL.

1866

Nov. 3.

Easement—Watercourse—Riparian Owner—Grant—Division of Stream.

The plaintiff was the lessee of a mill situated on riparian land. A., through whom he derived title, had, in 1804, under a written agreement with the adjoining higher riparian owner, and subject to an annual payment, constructed a goit on the higher owner's land, intercepting the water of the stream at a weir in that land, and bringing it thence to his mill. The flow of the water through this goit had ever since been enjoyed by the mill-owner, and used for the purpose of working the mill; and the annual acknowledgment had been paid. The defendant, a riparian owner above the weir, and also a mill-owner, intercepted the water of the stream for the purposes of his mill; and the plaintiff sued for damages:—

Held, that he was entitled to recover.

Held (per Pollock, C.B., and Channell, B.), that what was done amounted to a division of the stream into two courses; and that the plaintiff was a riparian proprietor in respect of the goit.

Held (per Bramwell, B.), that a riparian land-owner can grant to a non-riparian land-owner the flow of water from the stream to his premises, for the use of the

1866

NUTTALL
v.
BRACEWELL.

premises; and that the grantee may sue for a disturbance of his enjoyment by a higher riparian owner.

Stockport Waterworks Company v. Potter (3 H. & C. 300) considered.

THE plaintiff's mill was situated on riparian land, and was supplied with water by a goit leaving the stream at a point in the land of a higher riparian owner; the plaintiff brought this action for the diversion of water by a riparian owner above that point.

Declaration, that the plaintiff was possessed of a mill, lands, and premises, and also of a goit or cut running from a stream called the Corn Mill Beck to his mill, &c., and was by reason thereof entitled to the flow of part of the waters of the said stream from the stream along the goit or cut to the mill, &c., for the working and use of the mill, &c., and that the defendant wrongfully diverted from the stream, water which otherwise would and ought to have flowed from the stream through the goit to the mill, &c., by reason whereof the plaintiff was unable to work and use his mill, lands, and premises, so beneficially as he otherwise would have done.

Pleas. 1. Not guilty. 2. That the plaintiff was not entitled to such flow of water as in the declaration alleged. 3. That the plaintiff was not possessed of the mill, lands, premises, goit or cut, in the declaration mentioned. Issue thereon.

The facts appearing on the trial were these:—In 1804, William Bracewell, a relative of the defendant, was the owner of a mill called Coates Mill, situated at a little distance from a stream called the Corn Mill Beck, and also of the land thence up to the bank of the stream. The land on the stream above the mill was owned by one Bagshaw, and was called Tom Milner's Ing, and in this close there was a weir upon the stream at a place called Heble Bridge. In 1804, a written agreement was made between Bagshaw and Bracewell, by which the latter was permitted to cut a goit from the weir in Tom Milner's Ing, through the Ing into Bracewell's land, and for this and another water privilege he was to pay Bagshaw 5s. annually. (1) This goit was made accordingly, and had since then,

(1) This agreement was as follows: "Memorandum of an agreement entered into and made, the 14th day of March, in the year of our Lord 1804, between William Chambers Bagshaw, Esq., M.D., of Oakes, in the county of Derby,

on the one part, and William Bracewell, of Coates, in the county of York, on the other part. The said W. C. Bagshaw doth agree for him and his heirs to allow the said William Bracewell to cut into a certain meadow called

and up to March, 1865, been used for the purpose of bringing the water of the stream from the weir to the mill for the use of the mill, and the acknowledgment of 5s. had during that time been paid. Till about thirty years ago, the mill was worked by water power only, and since then by steam power also.

William Bracewell, by his will made in 1819, devised the premises to his son William and his heirs; but his son having died, the testator, by a codicil made in 1830, devised to a trustee all that he had by his will given to William, in trust for the son's children (three sons and one daughter) in certain proportions. Some time after the testator's death, the three grandsons—William, Thomas, and Christopher—commenced to carry on business at the mill, which had since the testator's death been worked by a firm of Grimshaw and Bracewell. In 1855, they mortgaged their shares to (amongst others) their sister, Sarah Bracewell; and in May, 1857, they executed a deed for the benefit of their creditors, by which they conveyed to the defendant in this action, and to two others, all the messuages, lands, and hereditaments to which they were entitled, upon trust to sell for the benefit of creditors. In September, 1857, the trustees of the deed, with the concurrence of the three grandsons, conveyed the equity of redemption in these premises to Sarah Bracewell, the premises being described, both in the mortgage deeds and in this conveyance, as "all that mill or factory situate, standing, and being on the said Coates estate, with

1866

 NUTTALL
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Bank Meadow, and to build a goit therein for the space of 140 yards, beginning from the north side of W. Bracewell's field called Water Ing, and to finish at the rivulet on the west side of Bank Meadow; and the said W. Bracewell doth covenant to make good the land with the said W. C. Bagshaw. And the said W. C. Bagshaw doth further agree to allow the said W. Bracewell to make another goit, through a certain meadow called Tom Milner's Ing, beginning at the west end of the same, at a place called Heble Bridge, and to extend to the north side of the said Tom Milner's Ing, entering the land of W. Bracewell

called Sandy Bank; this goit to be 50 yards in length; the land to be made good at the expense of the said W. Bracewell. The said W. Bracewell doth further covenant to pay for the said privilege and privileges the annual sum of 5s. of lawful money to the said W. Bagshaw, his heirs, executors, and administrators. As witness the hands of the said parties, the day and year above-mentioned. — W. C. Bagshaw, W. Bracewell."

It was not shewn at the trial to what goit the first part of the agreement referred, but it was agreed that the one mentioned in the latter part of the document was the goit in question.

1866 the reservoir, goits, weirs, and floodgates, warehouses and other out-
 NUTTALL buildings and appurtenances; which said mill and premises are
 v. now, or late were, in the occupation of the said W. Bracewell,
 BRACEWELL. T. Bracewell, and C. Bracewell."

Sarah Bracewell, by a lease dated 21st November, 1860, demised the premises to the plaintiff for twenty-one years from the 2nd of February, 1860, by the same description, except that the words "thereto belonging" were added after "appurtenances," and that the occupation was described as that of William Bracewell.

The defendant, who owned the land higher up the stream, and who was also in occupation of Tom Milner's Ing, had since 1859 diverted the water from the stream to a mill upon his land, and both detained and consumed it, so that the working of the plaintiff's mill became almost impossible.

The cause was tried before Keating, J., at Leeds, at the spring assizes, 1866, when a verdict was found for the plaintiff for 250*l*. A rule having been obtained for a new trial, on the ground that the plaintiff was a mere licensee, and not a riparian proprietor, and had no right to the water or to maintain the action, and that the learned judge should have so directed the jury, and also on the ground that the verdict was against evidence,

May 29, *Manisty, Q.C.*, and *Kemplay*, shewed cause. If the plaintiff were to be treated as merely in occupation or quasi occupation of the use of the water, it would perhaps be impossible to contend in this court after the decision of the Exchequer Chamber in *Whaley v. Laing* (1), and the interpretation of that case by Bramwell, B., in *Stockport Waterworks Company v. Potter* (2), that he could maintain the present action. But the plaintiff is not merely in occupation; he is in occupation by a lawful title derived from the riparian owner. Were that title merely the precarious and permissive one of a licensee, the plaintiff would still, as against the defendant, who is a wrong doer, be entitled to maintain an action. But he is in fact, at the least, the grantee of a right of enjoyment, which the riparian owner was entitled to transfer to him; and even if, as against that owner, the existence of the memorandum is considered to prevent the sixty years' enjoyment

(1) 3 H. & N. 675, 901; 27 L. J. (Ex.) 422. (2) 3 H. & C. at p. 318.

from constituting an absolute right, yet as against the defendant it is a sufficient title, for there is evidence of a lawful possession, and no evidence of its determination. Though a deed would be necessary to create the right, a deed may be presumed, and for the present purpose it is not necessary to assume that the deed made a grant in fee simple. The contention that such a grant is possible is opposed to the decision of this Court in *Stockport Waterworks Company v. Potter* (1), but the judgment there was not unanimous, and the Court is asked, if necessary, to reconsider that decision. The right to the use and enjoyment of the flow of water in a natural stream is a right which, like other rights of property, the owner is entitled to grant to a third person, provided it is granted as appurtenant to land, and for the use and benefit of the land in respect of which the grant is made. It is so granted and used here, and the difficulty which occurred in *Ackroyd v. Smith* (2) is therefore avoided. The objection made to such a grant on the ground of convenience is not well founded; for, in the first place, as is pointed out by Bramwell, B., in *Stockport Waterworks Company v. Potter* (3), the inconvenience would be no less if a foot of the actual bank were granted, though the grantee's title would then be unassailable. In the second place, the decision in *Sampson v. Hoddinott* (4) shews that the riparian owner is entitled to make no such use of the stream as in any way materially alters its flow, though within that limit he is entitled to make what use of it he will; his enjoyment, then, is not any more restrained by the possibility of such a grant than it would be otherwise; for he could in no case lawfully use the stream so as to materially affect it, and it can be no ground of complaint that he is not allowed to exceed his legal right. But, further, this case may be distinguished from *Stockport Waterworks Company v. Potter* (1) on two grounds. First, it is alleged in the declaration that the plaintiff was possessed of the goit, this possession is traversed, and the issue is found for the plaintiff. The verdict stands, therefore, that the plaintiff is possessed of the goit, which includes a portion of the bank itself, and therefore constitutes him an actual riparian pro-

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(1) 3 H. & C. 300.

(4) 1 C. B. (N.S.) 590; 26 L. J.

(2) 10 C. B. 164; 19 L. J. (C.P.) 315. (C.P.) 148.

(3) 3 H. & C. at p. 320.

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prietor. And this finding is consistent with the evidence, for there is nothing in the agreement or in the enjoyment inconsistent with the supposition of a demise of the goit itself. Secondly, this may properly be treated as a case of the diversion of a stream, or the division of it into two courses, which is the case suggested in the judgment of the majority of the Court in *Stockport Waterworks Company v. Potter*. (1) In this view, then, the plaintiff has the sanction of that judgment for saying that he is a riparian proprietor in respect of the goit, and entitled to the ordinary riparian rights.

Overend, Q.C., Field, Q.C., and Rew, in support of the rule. This is nothing but the ordinary case of water drawn from a stream by a sluice, and does not at all resemble the case of a divided course. The difficulties and inconveniences pointed out in *Stockport Waterworks Company v. Potter* (1) exist here equally; either, therefore, the grounds of that decision extend to the case of a divided stream, or else this is not such a case as was contemplated in the passage cited from the judgment. Nor is the right to the flow of the water claimed by the plaintiff in his declaration as a riparian right, but he alleges the possession of a mill and a goit, and a right by reason thereof to a flow of the water of the stream down the goit to his mill. Neither is there any pretence for saying that there has been any demise of the goit itself; neither the agreement nor the enjoyment lead to such an inference. The agreement permits the owner of the mill to make a goit through Bagshaw's land, and to have the water flow through it on paying an annual acknowledgment, and there is nothing in the enjoyment to shew any greater right. The case is therefore reduced to the same question as that decided in *Stockport Waterworks Company v. Potter* (1), and it is submitted that that decision was right. First, the argument of convenience on which the Court proceeded is valid. The riparian owner is competent to acquire rights of extraordinary use, and he is interested in not having this lawful kind of acquisition rendered more difficult by the creation of new, unseen, and unascertainable interests. The reasoning is analogous to that on which *Ackroyd v. Smith* (2), *Keppel v. Bailey* (3), and

(1) 3 H. & C. 300.

(2) 10 C. B. 164; 19 L. J. (C.P.) 315.

(3) 2 My. & K. 517.

Hill v. Tupper (1), were decided. Secondly, such a grant is contrary to the nature of the right to the flow of a natural watercourse as established in *Mason v. Hill*. (2) The right is not indeed founded on the fact of appropriation, as was formerly thought, but it is founded on the fact of the power of appropriation. The riparian owner, having access to the bank, has the natural power of taking the water, and this is the origin of his right to take it. He cannot give the same right to another person who has not that right of access, and this reasoning is adopted in *Stockport Waterworks Company v. Potter*. (3)

[MARTIN, B. As a general rule, is it not true, as was said by my Brother Bramwell in that case, that if a man has any kind of property, he is entitled to grant to another a part of the benefit which the law gives him in it? He has, as part of his rights of property in the land, the right to take the water of the stream flowing through it, and why may he not grant that right to another?]

Ackroyd v. Smith (4) shews that the right is limited.

[MARTIN, B. There, and in *Hill v. Tupper* (1), it was attempted to create a right in gross, but here the right is claimed as appurtenant to land and for the use of the land.]

In *Miner v. Gilmour* (5), where the rights of a riparian proprietor are laid down, no such right is contemplated in any other person. But even supposing it were competent to the riparian owner to make such a grant, there is no evidence of a grant here; the plaintiff's right is merely that of a licensee, and *Whaley v. Laing* (6), and the comments on that case in Gale on Easements, p. 280 n, are opposed to the right of a licensee to sue.

Cur. adv. vult.

On June 26, the Court (Pollock, C.B., Martin, Bramwell, and Channell, BB.) gave judgment for the plaintiff, discharging the rule, but postponed the statement of their reasons.

Nov. 3. The following judgments were delivered :

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| (1) 2 H. & C. 121 ; 32 L. J. (Ex.) 217. | (5) 12 Moo. P. C. at p. 156. |
| (2) 5 B. & Ad. 1. | (6) 3 H. & N. 675, 901 ; 27 L. J. |
| (3) 3 H. & C. at pp. 326, 327. | (Ex.) 422. |
| (4) 10 C. B. 164 ; 19 L. J. (C.P.) 315. | |

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PIGOTT, B., read the judgment of MARTIN, B. This is an action for the recovery of damages for the abstraction of water from a natural stream, called Corn Mill Beck, by the defendant, an upper riparian proprietor, whereby damage was caused to the plaintiff, the occupier of a mill called Coates Mill. Coates Mill is an old mill, erected upon land which for some distance abuts upon the stream in question; it is worked by water power obtained from the above stream. Prior to the year 1804, the water appears to have been taken from the stream by a goit leading into a reservoir, and thence to the mill by another goit; these goits and the reservoir are all in the land on which the mill stands. In the year 1804, a Mr. Bagshaw was the owner of a close called Tom Milner's Ing, which also abuts upon the stream, and is immediately above the sluice; and on the 14th of March in that year, by a memorandum of agreement not under seal, Mr. Bagshaw agreed for himself and his heirs to allow William Bracewell, who was then the owner of Coates Mill and the land adjoining it, to make a goit for the conveyance of the water of the stream to the mill through the Ing, beginning at a certain place, and to extend to the boundary of the Ing, then entering the land of Mr. Bracewell, to be fifty yards in length, and 5s. a year was to be paid by Mr. Bracewell for this and another water privilege. This goit was made, and it began at a weir across the stream at Heble Bridge, which at the trial was alleged to be the property of the plaintiff; and from that time until the present the water of the stream ran in part down this goit towards Coates Mill, the residue of the water running in the old channel, so that the water of the stream entered the land upon which Coates Mill stands in two channels. It does not appear that injury was done to any one by the making or use of the goit. Neither the owner above, nor the owner below, seems to have sustained the slightest injury or inconvenience. The plaintiff is the occupier of Coates Mill, and the defendant, who, as has already been stated, is a riparian proprietor above, abstracted the water of the stream above, and to such an extent that the jury assessed the plaintiff's damages at 250*l*. But it was contended that he had no remedy for this damage, that he had no right of property in the goit, or in the flow of the water in it, in respect of which he could maintain an action; that he was a mere licensee, and had not any property.

The application and use of flowing water to work machinery is as old as the law. Corn mills have existed from time immemorial, and it appears, from old legal authorities, that fulling and other mills worked by water for the purpose of manufacture are of a very ancient date. Until the last century, steam as a power was, if known, not much in use; and until it was introduced, water power was very generally used, and it is still the cheapest when available. The mill is sometimes situated upon the bank of the natural stream, but more usually at some little distance from it; the water is conveyed to it by a goit or artificial cut, leading from the stream, and then, after turning the wheel of the mill, flows away in what is commonly called the tail goit. So, also, water was and is very frequently conveyed from the natural stream in the same manner for purposes of irrigation. And it is not too much to say, that the value of actual or supposed water rights of this character throughout England may be estimated by hundreds of thousands, perhaps millions. The law has been supposed to be well settled, and in my opinion is nowhere more clearly stated than by Lord Kingsdown, in *Miner v. Gilmour*. (1) He says: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

According to the law so enunciated, and which no doubt is the law, it would be competent for Mr. Bagshaw, or his successor in ownership of Tom Milner's Ing, to erect a mill upon it, and take the water from the stream to work it, provided he neither penned

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back the water upon his neighbour above, nor injuriously affected the volume and flow of the water of the stream to his neighbour below. And the law favours the exercise of such a right; it is at once beneficial to the owner and to the commonwealth. And if this be so, why may not the owners of two adjoining closes agree together, for their mutual benefit, to take the water through a goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter, and thereby doing no injury to any one. In point of fact, very many goits pass through the land of different landowners between the place where the water is taken from the stream and the mill where it works the machinery. The right to a flow of water in a goit is a well-known easement, and is an incorporeal hereditament, and although it is not competent for an owner of land to render it subject to a new species of burthen at his fancy or caprice, the burthen of one man's land being subject to the right of another to have a flow of water running through it to work his mill, is as old as the law itself, and in my opinion is the subject of property and of grant, and not merely of licence. It is true that, being an incorporeal hereditament, it cannot be created so as to immediately bind the original grantor, except by deed under seal; but, assuming that sixty years' undisturbed possession, originating in the agreement of 1804, does not confer a good title as against Mr. Bagshaw and his heirs, I think the actual possession and enjoyment of the goit by the plaintiff gives a good and valid right of action against the defendant, a wrong doer. The case of *Stockport Waterworks Company v. Potter* (1) was the sole authority relied upon by the defendant's counsel. It was a case where the water of the river Mersey was abstracted for the use of the inhabitants of Stockport for domestic purposes, and the complaint was that the defendants had fouled it. It is therefore different from the present. My Brother Bramwell differed from the other three judges of this court. I do not pretend to say which judgment is right. It suffices to me that it is not directly in point, and I decline to extend it, if indeed it is capable of being so extended as to hold that the plaintiff has no right of action. In my opinion the rule for a new trial ought to be discharged.

(1) 3 H. & C. 300.

BRAMWELL, B. The late Lord Chief Baron and my Brother Channell think that this case is not governed by *Stockport Waterworks Company v. Potter*. (1) As the judgment in that case was theirs, I ought to defer to their view of it, and it therefore does not prevent me from saying, as I do, that I think the plaintiff here is entitled to recover. I abide by the reasons I gave in the other case, which I understand are considered not erroneous, but inapplicable to the circumstances of that case. I wish, however, to add to what I then said. The principle on which it seems to me the plaintiff is entitled to recover is this. As a general rule, when a man has a property he may grant to others estates in and rights of enjoyment of it, and the grantees may maintain actions against those who disturb them. I do not say there is no exception; there may be for aught I know. A man entitled to land may grant leases, may grant the exclusive herbage, a right of depasturing, a right of way, a right to game. He may grant the mines underneath, or the right to get minerals, and other rights in or over the property, or of enjoyment of it. So, if the land is covered with water, he may grant rights of fishing. So the grantees of mines may regrant. So of chattels. The owner may let them to hire. And in all these cases the grantee may maintain actions in respect of the rights granted. Now what is the case here? Mr. Bagshaw is a riparian proprietor. Subject to the rights of those opposite and those lower down the stream, he may divert the water where it flows by his land. Why may he not grant this right or mode of enjoyment? I say the burthen of proof is on those who say he may not. This right of his, this mode of enjoying his property, is presumably grantable like others. Those who deny this must give a reason for it, and I have heard of none. It seems to me that all reasons of public convenience, and all other reasons, make this right grantable as much as any other right. But it may be said, How is *Hill v. Tupper* (2) distinguishable? One mode of enjoying land covered with water is to row boats on it, and the owner has an exclusive right. I think it easy to point out the distinction. It was competent for the grantors in that case to grant to the plaintiff a right of rowing boats on the canal; and had any one interfered with that right, the grantee might have maintained an

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(1) 3 H. & C. 300.

(2) 2 H. & C. 121; 32 L. J. (Ex.) 217.

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action against him. But the plaintiff there did not sue for any such cause of action. He sued, not because his rowing was interfered with, but because the defendant used a boat on the water. Now suppose the grantors there had granted to the plaintiff a right to row boats, and to J. S. a right (as far as the word is sensible), that no one but the plaintiff should row boats on the canal; clearly J. S. could not have maintained any action. He would not have sued in respect of any estate, or of any easement, or of any mode of enjoyment which was disturbed. Nor did the plaintiff in that case. It makes no difference that the two rights as far as possible were in him, viz. a right to row, and a right to exclude others. It was in respect of the latter he sued, and it mattered not he possessed the former. But apply this reasoning to the present case. The plaintiff complains that his right is interfered with. His right is not merely that no one shall take part of the water, but that the plaintiff shall take *all*, and this the defendant has prevented. On these grounds, as well as for the reasons I gave in *Stockport Waterworks Company v. Potter* (1), I think our judgment must be for the plaintiff.

CHANNELL, B., read the judgment of himself and POLLOCK, C.B. The facts of this case are very fully stated in my Brother Martin's judgment. The main question argued at the bar, indeed the only question argued on the part of the defendant was, whether or not this case was distinguishable from, or governed by, the case of *Stockport Waterworks Company v. Potter* (2); but the plaintiff contended that that decision, if applicable to the present case, was wrong. That case was argued before the Lord Chief Baron Pollock, my Brother Bramwell, my Brother Wilde (then a member of this court), and myself. The judgment of this Court was not unanimous; my Brother Bramwell strongly dissented from the judgment delivered by the Lord Chief Baron Pollock as his judgment, and which, as stated by the Lord Chief Baron Pollock, had the sanction of my Brother Wilde, though he, being no longer a member of this court, took no part in it. As that, though not an unanimous judgment, was a judgment of the majority of the members of this court who heard the argument, I should, even if I had altered my opinion,

(1) 3 H. & C. at p. 318.

(2) 3 H. & C. 300.

feel myself bound by the decision as governing the present case, unless this is distinguishable. But the present case seems to me to be distinguishable. I quite agree that the passage quoted by my Brother Martin from Lord Kingsdown's judgment in *Miner v. Gilmour* (1) very clearly, as well as accurately, states the law applicable to running streams. I think, however, that the decision in *Stockport Waterworks Company v. Potter* (2) was quite in accordance with the law as so stated; and, further, if the decision in the *Stockport Waterworks* case was wrong, then it appears to me that Lord Kingsdown's statement would require qualification. The *Stockport Waterworks* case in effect decided that a riparian proprietor cannot grant away his water rights apart from his estate, so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself. Now if that is wrong, then a riparian proprietor is not entitled to use the stream for extraordinary purposes, provided he abstains from thereby interfering with other proprietors, as Lord Kingsdown says, but "provided he *also* abstains from interfering with *the grantees* of other proprietors." I am not aware of any such additional restriction on the right of a riparian proprietor. It would go well nigh to destroy his rights altogether, for that can scarcely be called a right which is subject to an indefinite restriction, unascertained and practically unascertainable. I consider that the rights of a riparian proprietor with respect to the stream are limited only by those of persons in a similar or analogous position with respect to the stream as himself. These rights he can easily ascertain, and by that means ascertain his own. But he has no means of ascertaining who may be grantees, or what may be the value of their grant. If, therefore, a riparian proprietor grants to some one, not such a proprietor, a right to abstract water from the stream, as in the *Stockport Waterworks* case, I think the grantee can sue only the grantor for any interference with him. If, however, two adjoining riparian proprietors agree to divert the stream, so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is, I think, different. What is done is apparent to all, and any use that may be made of the new stream, as to turn

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(1) 12 Moo. P. C. at p. 156.

(2) 3 H. & C. 300.

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a mill for instance, is as apparent as if the mill were upon the old stream. What is done by the two proprietors may be supposed to be a more convenient way of making use of the flow of water while it in no way diminishes or affects the rights of the other proprietors.

This distinction is alluded to in the judgment of the majority in *Stockport Waterworks Company v. Potter* (1), where it is said: "The case where a riparian proprietor makes two streams instead of one, and grants land on the new stream, seems analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights." Now, in the present case, Coates Mill is on an estate abutting on the river. Prior to 1804, the water came to the mill from the stream through a goit and a reservoir, all on the mill-owner's estate. Since then there has been either an additional supply of water or a substituted one, I am not sure which, through a goit leaving the river higher up on the estate of another proprietor. Now it seems to me that the goit is to all intents and purposes a mere stream, and any person having land upon it would have the rights of a riparian proprietor, viz. to use the water in any way not interfering with others. I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different; but that an artificial stream may be on the same footing as a natural one as regards the rights of riparian proprietors is held in *Sutcliffe v. Booth*. (2) I think, therefore, that in the present case the plaintiff has a right of action, and the rule for a new trial ought to be discharged.

Rule discharged.

Attorneys for plaintiff: *Risley & Stoker, agents for W. Paget, Skipton.*

Attorneys for defendant: *Raw & Gurney, agents for Henry Robinson, Settle.*

(1) 3 H. & C. at p. 327.

(2) 32 L. J. (Q.B.) 136.

HUFFER v. ALLEN AND ANOTHER.

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Action for maliciously signing Judgment—Malicious Arrest—Estoppel—Judgment—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 27.

A. having issued a writ of summons against B., specially indorsed for 28*l.*, B., without appearing to the writ, paid 10*l.* to A., on account of the debt. A. afterwards, under the Common Law Procedure Act, 1852, s. 27, signed judgment for default of appearance, for the full amount of 28*l.* and costs, and issued a ca. sa., indorsed for that amount, under which B. was arrested, and paid the sum demanded. B. having brought an action against A. for maliciously and without probable cause signing judgment and issuing execution:—

Held, that, whilst the judgment stood for the full amount, it estopped the plaintiff from denying the correctness of the judgment or of the execution.

Quære, whether, if the judgment had been rectified, by reducing it to the amount for which it ought to have been signed, as in *Hodges v. Callaghan* (2 C. B. (N.S.) 306), the action would have been maintainable?

DECLARATION. First count, that the plaintiff being indebted to the defendants in the sum of 28*l.*, the defendants commenced an action against the plaintiff, in the Queen's Bench, for the recovery of the debt by a writ specially indorsed and personally served; that the plaintiff, before appearance, and before judgment, paid to the defendants, and the defendants accepted, the sum of 10*l.* on account of the debt: that the defendants, after such payment, wrongfully and maliciously, and without reasonable or probable cause, signed judgment for default of appearance for the full amount of the debt of 28*l.* and costs, and thereby wrongfully and maliciously, and without reasonable or probable cause, procured the said judgment to be signed for the recovery of a debt wherein the sum recovered exceeded the sum of 20*l.*, exclusive of costs; that the defendants wrongfully and maliciously, and without reasonable or probable cause, issued a writ of ca. sa. against the plaintiff, indorsed for 32*l.*, for the debt of 28*l.* and costs and costs of execution, under which the plaintiff was arrested, and was compelled, in order to procure his discharge, to pay the full amount indorsed and sheriff's fees. Averment that at the dates of the judgment and of the writ only 18*l.* was due from the plaintiff to the defendants, which the plaintiff was ready to pay; and claiming damages in respect of the 10*l.*, the extra fees and costs, and the detention.

Demurrer and joinder.

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Second count, similar to the first, except that it only stated that the defendants recovered judgment against the plaintiff for 28*l.*, that "the now plaintiff paid to the now defendants, and they accepted and received from him, the sum of 10*l.* for and on account of the said debt and costs in the said action," and that the defendants wrongfully, &c., issued a ca. sa. for the full amount, &c.

Seventh plea to the second count, that the plaintiff ought not to be admitted to say that the plaintiff paid to the defendants, and that the defendants accepted, the sum of 10*l.* on account of the debt and costs in the said action, for that the plaintiff made the supposed payment of the sum of 10*l.* after the commencement of the said action and before judgment, and that after such supposed payment, such proceedings were thereupon had in that action, that afterwards, and before the suit, it was considered by the judgment of the Court in the said action that the now defendants should recover against the now plaintiff the whole of the said debt and costs in the said action; and the said judgment still remains in force; and this the defendants are ready to verify; wherefore they pray judgment, if the plaintiffs ought to be admitted, &c. (1)

Demurrer and joinder.

Hayes, Serjt. (*Grantham* with him), in support of the demurrer to the declaration, and of the plea. The two demurrers come to the same point; the second count leaving the time of payment uncertain, the plea fixes it to a time before judgment. In each case, therefore, the defendants' contention is that the judgment is an estoppel. The pleadings shew a judgment of the Court for the full amount, and whilst that stands unimpeached, it is conclusive evidence as between the parties that the whole amount for which it was signed was due. It is an estoppel which can be removed by nothing but fraud; in the absence of fraud, the existence of the judgment is evidence of its correctness, and none the less so for being signed for default of appearance under 15 & 16 Vict. c. 76, s. 27. The case of *Gilding v. Eyre* (2) is not in favour of the plaintiff, for there the payment was made after judgment, and what was

(1) There was also a replication of fraud to this plea, which was demurred to; but that replication and demurrer were withdrawn.

(2) 10 C. B. (N.S.) 592; 31 L. J. (C.P.) 174.

complained of was the issuing of a writ for the full amount after the judgment had been partially satisfied. But here, in order to impeach the issuing of the writ, it is necessary to impeach the judgment itself, for if the judgment was right the writ was right also. The plaintiff has adopted the wrong course. If the judgment was in fact signed for too much, he ought to have applied to the Court to reduce the amount, as was done in *Hodges v. Callaghan* (1); and in that case he would probably have been allowed to bring no action, as the act complained of might very likely be due to a mistake, the defendants' attorney signing judgment in ignorance of the payment.

H. Matthews (*Griffiths* with him), in support of the declaration and the demurrer to the plea. If the plaintiff is unable to maintain this action he has no remedy for the wrong he has suffered, for *De Medina v. Grove* (2) shews that no action for money had and received will lie for money paid under such circumstances. On the other hand, he is compelled to pay the money in order to obtain his liberty, and has suffered by the compulsory payment and by the imprisonment a double wrong, for which he ought to have redress. It is not necessary to impeach the judgment, for the judgment is evidence only that the amount for which it was signed was due at the time when it was sued for; it does not, therefore, conclude the plaintiff here from saying that the writ was wrongly issued. But, if necessary, *Hodges v. Callaghan* (1) is an authority for saying that the judgment ought not to have been signed for the full amount, and is therefore irregular.

[BRAMWELL, B. It is certainly said there that the judgment *ought* to have been signed only for the sum really due; but that *ought* must mean morally, not legally. Suppose the payment after action disputed, or the fact of payment, or the authority of the person to whom it was made, or the appropriation of it, how can the regularity of the judgment depend upon these matters?]

On the other hand, these matters cannot, as was said by the Court in *Gilding v. Eyre* (3), be tried upon affidavit by a judge, and how, except in the present form of action, can they be sub-

(1) 2 C. B. (N.S.) 306; 26 L. J. (C.P.) 171. (3) 10 C. B. (N.S.) 592; 31 L. J. (C.P.) 174.

(2) 10 Q. B. 152, 172.

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mitted to the decision of a jury? The demurrer admits the payment of the money, it therefore admits the malice and the absence of reasonable or probable cause.

Hayes, Serjt., was not called on to reply.

KELLY, C.B. Our judgment must be for the defendants. I say so with regret, because no doubt if the act of the defendants was knowingly done, that is, if they knew that the debt was reduced below 20*l.* at the time of signing judgment, their act was highly unjustifiable. But we must here determine the legal question, which is, whether the previous judgment, which is in contemplation of law the act of the Court, estops the plaintiff from bringing this action, the first step in which is to impeach that record. It is a simple and unanswerable argument against its maintenance, that it is not competent to either party to an action to aver anything either expressing or importing a contradiction to the record, which, while it stands, is as between them an evidence of uncontrollable verity. Now here an action is brought for 28*l.*; before appearance, the defendant in that action makes a payment reducing the debt to 18*l.*, but takes no further steps; the then plaintiffs sign judgment for 28*l.*, and proceed to issue execution, under which the defendant is taken. The then defendant now avers that the judgment was signed, and the execution issued, wrongfully and maliciously, and without reasonable or probable cause, and on this averment founds his action against the judgment creditors. But he cannot make this averment, and therefore cannot maintain this action, whilst the judgment, against which no averment can be admitted, stands as evidence that when judgment was signed the debt which the then defendant owed was 28*l.*, and not 18*l.* It is contended that if he cannot maintain this action he is without remedy. But that is not so. Although while the judgment stands it cannot be contradicted, it is always open to the Court on motion to correct its judgment, to relieve any party who may be unduly prejudiced by any act done under its order, and to prevent any injurious consequences which may flow from its error. As soon as the then defendant ascertained that judgment was signed for 28*l.* it was competent to him to apply to the Court or a judge at chambers to reduce the amount

from 28*l.* to 18*l.*, or (if execution had been issued) to set aside the execution on the payment of the less sum. As he has failed to do this, the judgment stands in the way of his present action. Whether, if he had done it, he could have maintained his action, it is unnecessary to say. If the former plaintiffs actually knew of the payment, and nevertheless signed judgment and issued execution for the full amount (for it may have been merely an error, caused by the payment being made to the plaintiffs, and judgment being signed in ignorance of this fact by their attorney), I do not see any reason why the present plaintiff should not, after obtaining from the Court the rectification of its judgment, maintain an action against them. But it is unnecessary to decide this; it is sufficient to say that the existing judgment is here an insuperable impediment.

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BRAMWELL, B. I entirely agree with my Lord, except that I cannot say that I regret the result of our judgment, for the plaintiff has himself caused the difficulty by not pursuing the proper course. That course would have been to apply to the Court to make the judgment regular; he would then have got his money back, together with the costs caused by the then plaintiffs' irregularity, but he would probably also have been restrained from bringing this action. Rather than run that risk, he has chosen to let the judgment stand, and resort to this remedy, and he has deservedly failed. But however this may be, we must decide for the defendants, for the plaintiff cannot attack any of their proceedings unless he can attack the judgment, and this he clearly cannot do. His declaration is equivalent to saying, "You have got the judgment of the Court, but that judgment you knew to be wrong." To admit such a declaration would be contrary to all analogy and precedent. It is said, the demurrer admits that the 10*l.* was paid as alleged, and it therefore admits that the judgment was wrongfully signed. But this is not so; the demurrer amounts only to this, "I decline to enter into the question which you raise; you are concluded by the judgment." It might as well be said that the right to maintain an action for malicious prosecution was vested by the mere allegation of malice; but in such a case also the demurrer merely says that the plaintiff has not shewn himself entitled to maintain his suit. Whether if the judgment were

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amended without terms the plaintiff could have brought an action, is not to my mind clear. Although in a sense it may be said that the former plaintiffs ought not to have signed judgment for the greater sum, yet on the other hand, in strictness it was the duty of the defendant to appear and plead, and pay the money into court. As to this, I will only say that I pronounce no opinion, not having satisfied my mind upon it.

CHANNELL, B. I also think that the defendants are entitled to our judgment upon both demurrers, which result substantially in the same point. It is said that the plaintiff can have no action for money had and received, and this is true, for the money was paid under the process of the Court. But it is sought on that ground to impress us in favour of the plaintiff's claim, by saying that if it be denied he is without remedy for the wrong done him. It is clear, however, that, whilst the judgment is on the rolls of the court in the form stated in the pleadings, it must be taken to have been rightly signed for the greater amount. If the record were amended, the amendment would have relation back to a time previous to the bringing of the action, and the judgment would stand for 18*l.* at that date; but I will not give any opinion on the question, whether in that case the plaintiff could have maintained an action.

PIGOTT, B. I am of the same opinion. It is only necessary to say, that the plaintiff cannot here succeed. If the judgment were set right, the defendants would then appear to have issued a *ca. sa.* wrongfully and without reasonable or probable cause, and to have thereby given the plaintiff a good ground of action. But I give no opinion on this point; it is sufficient to say, that while the judgment stands, it is not competent to the plaintiff to aver anything against it.

Judgment for the defendants.

Attorneys for plaintiff: *Cooke & Talbot.*

Attorneys for defendants: *Rooks, Kenrick, & Crook.*

TETLEY AND OTHERS v. WANLESS.

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*Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—
Deed of Arrangement — Inequality — Release — Tender of Composition —
Scheduled Creditors.*

A deed of arrangement, under s. 192 of the Bankruptcy Act, 1861, between the debtor of the first part, J. D. a surety of the second part, and the several persons creditors of the debtor whose names were thereunto subscribed and all other the creditors of the debtor of the third part, after reciting that the defendant was indebted "to the said several creditors in the several sums of money set opposite to their respective names in the schedule" thereunto written, and that it had been agreed by the requisite majority in number and value of the "said several creditors" to accept the composition and security therein expressed in full satisfaction of their respective debts, witnessed that, in consideration of the joint and several promissory notes of the debtor and J. D. for the payment of such composition "on the respective sums of money aforesaid," they, the said creditors, parties thereto of the third part, released to the defendant all actions, debts, &c., which they had against him, and accepted the stipulated composition in full satisfaction of the debts and sums due to them "*specified in the schedule*;" and the debtor and J. D. covenanted with each and every of the creditors parties thereto of the third part, to pay the composition "upon their respective debts *as aforesaid*," and to make and deliver to them the notes securing the same:—

Held, first, that the release in the deed was absolute and unconditional, and not confined to scheduled debts; and, secondly, that there was no inequality in the deed, as on the true construction of it all the creditors were equally entitled to the benefit of the covenants therein contained.

DECLARATION for money payable by the defendant to the plaintiffs for goods bargained and sold, goods sold and delivered, for interest and money due on accounts stated.

Plea, that after the accruing of the plaintiffs' claim, and after the 11th October, 1861, the defendant then being a debtor within the meaning of the Bankruptcy Act, 1861, and indebted to divers persons, a deed bearing date the 7th of May, 1866, was entered into between the defendant of the first part, John Dobbing of the second part, and the several persons respectively creditors of the defendant, or the authorized agents of such creditors (*not only those whose names and seals were thereunto subscribed and set, but also all other the creditors of the defendant*), of the third part; and by the said deed, after reciting that the defendant was indebted to the said several creditors, in the several sums of money set opposite to their several and respective names in the schedule thereunder

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written, and that it was agreed by a majority in number, representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, to accept the composition and security therein expressed in full satisfaction of such respective debts, it was witnessed that in pursuance of the said agreement, and in consideration of the joint and several promissory notes of the defendant, and the said John Dobbing, for payment to the said respective creditors of the defendant of the composition of 5*s.* in the pound on the respective sums of money aforesaid, dated on the 27th of April last past, and payable to the respective creditors of the defendant four months after the date thereof, they the said creditors, *parties thereto of the third part*, for themselves and their heirs, &c., did, to the intent that those presents should be effectual and binding on all the creditors of the defendant, pursuant to the provisions of the Bankruptcy Act, 1861, thereby release unto the defendant, his heirs, &c., all actions, suits, debts, claims, and demands which the creditors of the defendant had or had had against the defendant, and did thereby accept the said composition so payable as aforesaid in full satisfaction, and discharge of the several debts and sums of money due and owing to them by the defendant, *specified in the said schedule*; and they the creditors, *parties thereto of the third part*, did also, for themselves, their heirs, &c., covenant with the defendant that it should be lawful for him to plead those presents in bar to any action or suit which might thereafter be brought by any of them against him; and each of them, the defendant and the said John Dobbing, their executors, &c., thereby covenanted with each and every of the creditors, *parties thereto of the third part*, to pay to each and every of the creditors of the defendant a composition of 5*s.* in the pound upon their respective debts *as aforesaid*, and to make and deliver to them upon demand, at or immediately after the execution of those presents by the said majority of the said creditors the said promissory notes, and to pay the same when due. Averments of the assent of the statutory majority and of the due execution and registration of the deed, and that all conditions had happened and times elapsed necessary to make the deed as valid and binding on all the creditors of the defendant as if they had been parties thereto; that the plaintiffs were creditors of the defendant within

the meaning of the deed and of the Bankruptcy Act, 1861; that the claim in the declaration was a claim within the said deed, and in respect of which the said composition was payable, and that by reason of the premises the defendant became entitled to plead the said deed in bar to this action.

Replication joining issue on the plea.

The action was commenced on the 4th April, 1866, more than a month before the execution of the composition deed set forth in the plea, which, however, had been pleaded in bar, and not in formal words, to the "further maintenance" of the action. No tender of the composition to the plaintiffs, who were non-assenting and unscheduled creditors of the defendant, was specifically alleged in the plea, and at the trial before Lush, J., at the Cumberland summer assizes, 1866, none was proved to have been made. Under these circumstances a verdict was entered for the defendant, with leave reserved to enter it for the plaintiffs for 98*l.*, on the ground, first, that the plea was a plea in bar to the action generally, and not to the further maintenance thereof, and was not proved; and, secondly, that tender of the composition was put in issue by the replication and was not proved.

A rule was afterwards obtained in pursuance of the leave reserved; and also a rule calling on the defendant to shew cause why judgment should not be entered for the plaintiffs non obstante verdicto, on the grounds, first, that the deed mentioned in the plea did not release the plaintiffs' debt, not being a scheduled debt; secondly, that the provisions of the deed were unequal, the giving of the promissory notes being confined to scheduled debts; and, thirdly, that the plea was bad for not averring a tender of the composition.

Manisty, Q.C., and *Lewers*, shewed cause. The Common Law Procedure Act, 1852, s. 68, has abolished formal commencements and conclusions, and the plea which on its face shews by the date of the deed a defence arising after action brought, is a good plea to the further maintenance of the action: *Brooks v. Jennings*. (1)

[BRAMWELL, B. If the date of the deed is material, then the plea is good as a plea to the further maintenance of the action; but

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(1) Law Rep. 1 C. P. 476.

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it must be remembered that the date is not necessarily a part of the deed.]

It must be registered within twenty-eight days from its date, and that circumstance renders the date material.

[No further argument was heard on this point, the Court intimating that they would, if necessary, amend the plea by adding the formal words, the defendant paying the costs of the amendment. (1) It was urged, on the part of the plaintiffs, that in order to be good, even in its amended form, the plea must be limited to the debt sued for. The release in the deed could not apply to the damages and costs incurred, by reason of an action pending when the deed was executed, and could be no answer to a claim in respect of them (Bullen and Leake's Precedents of Pleading, 2nd edition, p. 388): *Thame v. Boast* (2); *Cook v. Hopewell*. (3) The Court, however, declined to amend in the limited form suggested, and accordingly the plea in its amended form was pleaded generally to the whole claim in the declaration.]

Again, it is objected that the tender of the composition was not averred in the plea, or that, assuming the general averment to be sufficient, it was put in issue by the replication and was not proved. As to the first point, the general averment of the performance of conditions precedent allowed by the Common Law Procedure Act, 1852, s. 57, includes an averment of tender, if tender was necessary to the release in the deed being a bar to the plaintiffs' claim. As to the second—assuming that tender was necessary—the replication admitted it. By the Common Law Procedure Act, 1852, s. 57, it is provided that the non-performance of a condition precedent must be specially pleaded, and therefore there should have been a special replication here, traversing the tender alleged.

(1) The Court were disposed to give the plaintiffs the costs of the cause up to the time of their confessing the plea, but it having been doubted whether the 22nd rule of Trinity Term, 1853—according to which “a plea containing a defence arising after action may be pleaded, together with pleas of defences arising before action, provided that the plaintiff may confess such plea, and

thereupon shall be entitled to the costs of the cause up to the time of the pleading such first-mentioned plea”—applies to a case where a plea to the further maintenance is pleaded alone, the plaintiffs claimed the costs of amendment only. See *Cook v. Hopewell* (11 Ex. 555).

(2) 12 Q. B. 808.

(3) 11 Ex. 555.

[BRAMWELL, B. The act of parliament says (s. 57) that a defendant shall not be at liberty to plead that all things necessary to enable the plaintiff to maintain his action have *not* happened; but there is also a provision (s. 77) that a plaintiff in a replication or subsequent pleading may traverse the plea or subsequent pleading of the defendant by a general denial. The framers of the act, whilst thinking it desirable to tie a defendant down to a denial of this or that condition precedent, nevertheless appear to have thought it safe to permit a general traverse at a subsequent stage.]

Such an interpretation of s. 77 would nullify to a considerable extent the beneficial operation of the act. But this point may be conceded, for in this case the release is *absolute*, and there was therefore no necessity either to allege or to prove a tender. The deed is made between the debtor and all his creditors, and they all absolutely and unconditionally release him from their claims: *Johnson v. Barratt* (1) is in point. Lastly, the deed is not unequal. No one class of creditors is privileged beyond another. The covenant to pay the composition and promissory notes is expressly with all of them.

Kemplay, in support of the rule. First, in order to make this release available against the plaintiffs a tender was necessary. *Johnson v. Barratt* (1) only decides that where there is an absolute release on one side and on the other an independent covenant to pay the stipulated composition no tender is necessary. In that case the release was "in consideration of the covenant," and was absolute. But here the release is in consideration of the promissory notes securing the composition; and before it is effectual the notes must be tendered. That being so, the tender must be alleged specifically in the plea. The general averment only covers conditions precedent to the deed being binding under the statute, but does not include anything to be done subsequently by the parties to the deed: *Fessard v. Mugnier*. (2) But assuming that it was sufficiently alleged, it was put in issue by the replication, according to the provisions of s. 77 of the Common Law Procedure Act, 1852, and should have been proved. Secondly, the release is qualified as well as conditional. It is confined to the scheduled debts, being

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(1) Law Rep. 1 Ex. 65. (2) 18 C. B. (N.S.) 286; 34 L. J. (C.P.) 126.

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given in consideration of the promissory notes securing payment of the composition to the "said respective creditors on the respective sums of money aforesaid," and being in its terms limited to the debts "specified in the schedule." Thirdly, the deed is unequal. Although professing to be made with all the creditors, the recital contracts its operation and benefit to the scheduled creditors. Then the benefit of the covenant by the debtor and surety to pay the composition and make and deliver the notes extends to the scheduled creditors only. It is a covenant "with each and every of the creditors parties hereto of the third part," to pay to each and every of them the stipulated composition "upon their respective debts *as aforesaid*," and the only debts aforesaid are those mentioned in the schedule: *Dingwall v. Edwards* (1); *Buvelot v. Mills*. (2) A non-assenting and unscheduled creditor, therefore, is not in the same position with a scheduled creditor.

KELLY, C.B. I am of opinion that this rule should be discharged. Two questions, and two only, in the view the Court take of this case, have been raised requiring our decision. Both turn on the validity of the deed set forth in the plea as a composition deed. The first is, whether the release contained therein is an absolute and unconditional release, or whether it is conditional on the payment of the stipulated composition or on the delivery or tender of the promissory notes in the deed mentioned. I think that the release is absolute and unconditional; and I arrive at that conclusion by looking at the terms of the deed itself. It purports to be made between the debtor of the first part, one John Dobbing of the second part, and the whole body of the creditors of the debtor of the third part; and it recites that the debtor was indebted to "the said several creditors in the several sums of money set opposite to their several and respective names in the schedule hereunto written," and that it had been agreed by the requisite majority in number and value of the "said several creditors" to accept the composition thereafter expressed in full satisfaction of their respective debts. The deed then witnessed that, in consideration of the joint and several promissory notes of the debtor and of Dobbing, for the payment to the said respective creditors of a

(1) 4 B. & S. 738; 33 L. J. (Q.B.) 161.

(2) Law Rep. 1 Q.B. 104.

composition of 5s. in the pound "on the respective sums of money aforesaid," they, the said creditors, "parties hereto of the third part," released to the debtor all actions, suits, debts, &c., which they might have against him. Now it is true that the recital in its terms relates only to the composition payable on the scheduled debts, and therefore, if this had been a case of mere assumpsit, it might be said that the consideration for the release was confined to a particular class of creditors, and therefore that the release was qualified. But this instrument is a deed, and no consideration at all is necessary to support the release; and although a consideration is averred, and may be insufficient to support a promise not under seal, still the deed is valid, unless indeed the consideration be illegal. Then the words of the release itself are absolute and unconditional, and it is given to the debtor by "the said creditors parties hereto of the third part," that is to say, by all the creditors, and amongst others, accordingly, by the plaintiffs. In my judgment, laying aside all questions as to the extent of the consideration, this is an absolute release of the debts of all the creditors. That being so, and the release being fettered by no conditions as to the tender or delivery of cash or notes to the creditors, I think the plaintiffs' claim must be held to be released.

Secondly, it is contended that the deed is unequal, and therefore not valid under the Bankruptcy Act, 1861. And I agree that if the effect of the whole deed were that the executing creditors or the creditors named in the schedule should alone be entitled to the benefit of the composition offered, the deed would be invalid. But if, upon an examination of the whole deed, it is found that an obligation is imposed on the debtor and his surety to pay the composition equally to all the creditors, this objection fails also. Now if what may be called the consideration clause alone is regarded, it does seem that the notes are to be delivered only to the scheduled creditors. On reading further, however, I find a covenant by the debtor and surety with "each and every of the creditors, parties hereto of the third part," *i. e.* with all the creditors, to pay the stipulated composition. This clause gives all the creditors an undoubted right to the full benefit of the composition; it makes them in equity, if not at law, parties to the deed. The observation is made that the covenant is to pay the composition upon the cre-

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ditors' respective debts "as aforesaid;" and it is argued that these words limit the covenant to the payment of a composition to the creditors named in the schedule. But I think such a reading of the clause would be repugnant to the contents of the deed taken as a whole. The words in question should rather be read as reason and common sense would appear to dictate. They come at the end of an express covenant with all the creditors. They should be referred, therefore, to those parts of the deed where all the creditors are mentioned, and be applied in this covenant to the debts of all. The covenant further provides for the delivery to "each and every of the creditors" of certain promissory notes. There may be some doubt whether this is a cumulative covenant or not—that is, whether the covenant is to pay 5s. in the pound in cash, and to secure the payment of 5s. more by the notes, or whether it is merely a covenant to secure 5s. in the pound by notes; but however that may be, the covenant is expressly entered into with all the creditors.

Both the first and second objections then fail. The release is absolute, and no tender of the notes is necessary; and the deed is not unequal, for the covenant is express to pay the composition to all, the plaintiff amongst the rest. The amendment suggested, therefore, having been made, I consider the plea in its amended form was proved. This rule must accordingly be discharged.

BRAMWELL, B. I am of the same opinion on both points. At the trial the defendant failed to prove his plea. An amendment was therefore necessary, and it having been made, I think the plea, thus amended, is proved. The deed therein set forth covenants with all the creditors to pay the stipulated composition; and looking at all its provisions, I think the release was absolute, and that no tender was necessary.

CHANNELL, B. I am also of opinion that the defendant is entitled to our judgment. It has been argued that the plea in its original form was not proved, but that ground of objection has been removed by the amendment made. Then there remain the questions raised by the application to enter the verdict for the plaintiffs on the points reserved, and by the motion to enter the judgment

non obstante veredicto, which are substantially the same. The first point for our decision has reference to the release. Was it conditional, or was it absolute, so as to bind the plaintiffs, who were non-assenting creditors? This question is distinct, and ought to be considered apart from that of inequality. Now, without repeating the Lord Chief Baron's reasons, I think with him that this release was unconditional. The deed is entered into with all the creditors. Every one of them is in terms a party to it. It is true that the first recital describes the debtor as indebted to the "said several creditors in the several sums of money set opposite to their several and respective names in the schedule hereunto written," and this clause is followed by a clause stating it to have been agreed by a majority in number and value of "the said several creditors" to accept a certain composition. The contention on the part of the plaintiff is, that these words, "said several creditors," must mean the creditors named in the schedule, and referred to in the immediately preceding recital. But I do not agree with that proposition. *Primâ facie*, no doubt the words would apply to the antecedent next before them; but we may look at the rest of the deed, and, if necessary, apply the words, not to the antecedent next before them, but to the one next before that. This view of the construction to be put on a deed is supported by the decision in the House of Lords in *The Eastern Counties Railway Company v. Marriage*. (1) The other parts of this deed have been fully referred to by the Lord Chief Baron, and they all shew in what sense it was intended, viz. as a deed entered into by the debtor for the benefit of all his creditors. As to the second objection, that the deed, assuming it to contain an absolute release, is void for inequality, I am unable to see that it is unequal. The intention of the debtor is to give the same composition to all his creditors equally, whether they assent to the deed or not.

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PIGOTT, B. I am of the same opinion. The deed is expressed to be made between the debtor and all his creditors. Then looking at the form of the covenant and at the release, we find that the covenants to pay the composition are with all the creditors, and that they all join in the release. In spite of some grammatical

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criticisms that might be made on it, I think this is the fair interpretation of the deed, and that being so, it contains an absolute release, and no tender of the composition or notes to the plaintiffs was necessary. Upon the question of inequality I concur with the rest of the Court.

Rule discharged.

Attorney for plaintiffs: *R. Walthew, agent for Wood and Killick, Bradford.*

Attorneys for defendant: *T. M. & M. Howe, agents for Eglinton, Sunderland.*

Nov. 17.

WARBURTON *v.* THE GREAT WESTERN RAILWAY COMPANY.

Negligence—Master and Servant—Fellow Servant—Common Control.

The plaintiff was a porter in the employment of the L. & N. W. R. Co. at their Manchester station. The defendants also used that station, and their servants whilst within the station were subject to the rules of the L. & N. W. R. Co., and to the control of their station-master. The plaintiff, whilst engaged in his usual employment in the station, was injured by the negligence of the defendants' engine-driver, in shunting a train without signal:—

Held, that the plaintiff and the defendants' engine-driver were not fellow servants.

ACTION by a porter in the employment of the London & North Western Railway Company, at their Manchester station, against the Great Western Railway Company, for injuries caused by the negligence of one of the defendant's servants whilst using that station.

The defendants used the Victoria Station at Manchester, which belongs to the London & North Western Company, under their running powers, and under an agreement with that company. The defendants' servants, whilst managing the defendants' trains within the station, were subject to the station rules of the London & North Western Company, and to the direction of the station-master. On the 4th of July, 1864, the plaintiff was employed in cleaning carriages belonging to the London & North Western Company, which stood on a siding in the station, and which were separated into two divisions for the convenience of passage across the line. One of the

defendants' trains having arrived at the station and discharged its passengers, the engine-driver proceeded to shunt it on to the same siding, but, contrary to the rules of the station, did so without giving any signal to the pointsman, or receiving any from him. The train struck the carriages which were being cleaned, and the plaintiff, who was at the moment passing across the line between the two divisions of carriages, was caught by the buffers of those struck by the defendants' train, and jammed against the buffers of the remaining carriages. For the injuries so caused he brought this action.

The case was tried before Martin, B., at the last Manchester summer assizes, and a verdict was found for the plaintiff for 150*l*.

Nov. 6. *Brett, Q.C.* (*Crompton* with him), moved for a new trial, on the ground that the plaintiff and the defendants' engine-driver were fellow servants, and that the plaintiff ought therefore to have been nonsuited, or a verdict directed for the defendants. The true test of fellow service must be community in that which is the test of service. Now the test of service is subjection to control and direction. In *Sadler v. Henlock* (1) this is laid down as the test of whether the person, through whose negligence a plaintiff is injured, is a servant of the defendant, or an independent contractor. *Crompton, J.*, there says: "The test is, whether the defendant retained the power of controlling the work." Again in *Abraham v. Reynolds* (2), where the plaintiff was held not to be a servant of the defendant, and therefore entitled to sue the defendant for his servant's negligence, *Watson, B.*, says: "They are persons doing work for a common object, but not under the same control, or by the same orders." The test, then, of fellow service is, not the doing work for a common object, or being engaged in a common work. Neither is it the being paid by the same person, as is shewn by the case of *Degg v. Midland Railway Company* (3), for there the volunteer, who was paid nothing, was considered as on the same footing as the defendants' paid servants. But it is the working subject to a common direction and control, and such was the case here; both

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(1) 4 E. & B. 570, at p. 578; 24 L. J. (Q.B.) 138. (2) 5 H. & N. 143, at p. 149.

(3) 1 H. & N. 773; 26 L. J. (Ex.) 171.

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the plaintiff and the defendants' servants were bound to work according to the regulations of the London & North Western Company, and under the control of their station-master, and they are therefore in the position of fellow servants. He also cited *Murphy v. Caralli*. (1)

[CHANNELL, B., referred to *Morgan v. Vale of Neath Railway Company*. (2)]

Cur. adv. vult.

Nov. 17. The judgment of the Court (Kelly, C.B., Martin, Channell, and Pigott, BB., was delivered by

KELLY, C.B. This was an action tried before Martin, B., in which the verdict was for the plaintiff;—and a motion was made before my Brothers Martin, Channell, and Pigott, and myself, for a new trial.

The action was for negligence by the servant of the defendants, whereby the plaintiff sustained injury. The plaintiff was a servant in the employ of the London & North Western Railway Company, and was at work at the Victoria Station, in Manchester, when an engine-driver in the employ of the defendants, the Great Western Railway Company, having entered the station, shunted a train belonging to the defendants from one part of the station to another, and in so doing was guilty of the negligence complained of. The station was the property of the London & North Western Railway Company, and was used in common by the plaintiff's employers, and the defendants, and other companies. By an arrangement between these companies, the defendants' engine-driver ought to have awaited a signal from an officer of the London & North Western Railway Company before he shunted the train into the siding; but without doing so, and without any signal at all, he shunted the train, and negligently caused the injury in question to the plaintiff. The defendants were no doubt *primâ facie* liable for the negligence of their servant, but it was contended that under the circumstances before mentioned, the plaintiff and the engine-driver must be taken to have been servants engaged under one master, in one common employment, and that therefore, upon the authority of several cases lately decided,

(1) 3 H. & C. 462.

(2) Law Rep. 1 Q. B. 149.

the defendants were not liable for the act of their servant. The principle, or rather the proposition, of law established by these cases is, that where two or more persons are the servants of one master, and engaged in one common employment, the master is not liable to an action for any injury sustained by one servant by reason of the negligence of another, in the work or employment which is common to both, or incidental to the carrying on of the general business, or the operations in which the one and the other are engaged. And the ground upon which these decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant, under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive. This proposition, to the extent to which I have stated it, and which is to be deduced from the case of *Morgan v. Vale of Neath Railway Company* (1), and many other authorities, has now become established law. But we are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment or operation under the same master, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore this action is maintainable.

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Rule refused. (2)

Attorneys for defendants: *Maples & Co.*

(1) Law Rep. 1 Q. B. 149.

(2) On the same day, *Brett, Q.C.*, the whole damages at once, but the Court refused the application. asked leave to appeal, offering to pay

Nov. 22.

HANDLEY v. FRANCHI.

Practice—Bail Bond—Sufficiency of Affidavit of Debt.

An affidavit of debt, whereon a judge's order holding a defendant to bail was founded, stated simply that the defendant "was well and truly indebted" to the plaintiff, "for money lent and goods sold and delivered," without averring either that the money was lent or that the goods were sold and delivered by the plaintiff to the defendant:—

Held, insufficient.

Garth, Q.C., obtained a rule in this case, calling on the plaintiff to shew cause why a certain bail bond, delivered to the sheriff of Middlesex, should not be delivered up to be cancelled, and why the plaintiff should not pay to the defendant the costs occasioned by the arrest and of this application, upon the ground of the insufficiency of the affidavit upon which the judge's order, holding the defendant to bail, had been made. The affidavit of the plaintiff, as far as regarded the statement of the debt between the parties was as follows:—"The above-named defendant is well and truly indebted to me in the sum of 182*l.* 2*s.*, for money lent and goods sold and delivered." It did not state that the money was lent and the goods sold and delivered *by the plaintiff to the defendant*. On the motion, *Taylor v. Forbes* (1) was relied on.

C. P. Butt shewed cause, and contended that the statement of the debt sued for in the action was sufficient. In *Moulthby v. Richardson* (2), an affidavit that the defendant was indebted to the plaintiff in a certain sum, "as he computes it," was held enough; and the same was held in *Tyler v. Campbell* (3), of an affidavit alleging the defendant to be indebted to the plaintiff "in the balance of an account stated," without adding "and settled between them."

Garth, Q.C., in support of the rule, was not called upon.

KELLY, C.B. I am of opinion that this rule should be made absolute. If we were to sanction laxity, to the extent which exists in the present case, in affidavits the effect of which is to deprive the subject of his liberty, it would soon be considered sufficient for

(1) 11 East, 315.

(2) 2 Burr. 1032.

(3) 3 Bing. N.C. 675.

one person simply to make oath, in general terms, that another was indebted to him, in order to cause the debtor to be arrested. I think, however, that enough must be shewn on the face of an affidavit to hold a person to bail, to afford ground for an indictment for perjury, if it should turn out that no such cause of action existed as that sworn to.

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CHANNELL, B. I am of the same opinion. This affidavit would certainly have been defective under the old law, and we ought not to extend the rules respecting such affidavits now that arrest on mesne process is abolished.

PIGOTT, B. In deference to my learned Brothers, I agree that this rule should be discharged; but my own opinion is rather that the words "indebted to me," sufficiently shewed that money had been lent by the plaintiff to the defendant.

Attorneys for plaintiff: *Pritchard & Sons.*

Attorney for defendant: *B. Lumley.*

ROGERS v. ROBERTS.

Nov. 24.

Execution—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 198.

After the sheriff had seized under a writ of fi. fa., the execution debtor executed a deed under the Bankruptcy Act, 1861, which was duly registered and gazetted. On an application by the debtor to the Court, the sheriff was, under s. 198 of the act, directed to withdraw.

Marks v. Hall (Law Rep. 2 Q. B. 31) followed.

THE plaintiff having recovered judgment, issued a fi. fa. against the defendant's goods. After the sheriff had seized under the writ, a deed was executed by the defendant under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), which was duly registered and gazetted; and the defendant, relying on the provisions of s. 198 (1), applied to Martin, B., at Chambers, to direct the sheriff to withdraw. The learned judge made the order, giving the creditor leave to apply to the Court.

(1) Section 198 enacts, that the certificate of the filing and registration of the deed under the hand of the chief registrar, and the seal of the court, shall be available to the debtor for all purposes as a protection in bankruptcy.

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Crompton Hutton now moved to rescind that order.

[MARTIN, B., referred to a case of *Marks v. Hall* (1), decided the day previous in the Queen's Bench.]

The writ there was a ca. sa., here it is a fi. fa.

KELLY, C.B. The order of my Brother Martin was quite correct, and in strict conformity with the words of the act of parliament. It is not disputed that, if the process were against the person of the debtor, the Court would clearly be bound to discharge him out of custody, and so prevent the process from being "available." The case of *Baerselman v. Langlands* in this Court (2) and *Marks v. Hall* (1) in the Court of Queen's Bench are decisive. It must, then, be sought to distinguish between the case of process against the person, and process against the property; but the words of s. 198 relating to the two are absolutely identical, and there is no ground whatever for the distinction.

MARTIN, B. I am of the same opinion. The real question is, what is the meaning of the word "available," and this admits of no reasonable doubt. The policy of the old law was rather to succour the diligent creditor; the new law aims more at protecting the general mass of creditors, and providing for an equal distribution of the assets. It is difficult to provide fairly for these conflicting interests; but at present we are only called upon to declare the law as it stands, and there can be no doubt that the meaning given to the word "available" by the Queen's Bench is right.

BRAMWELL and PIGOTT, BB., concurred.

Rule refused.

Attorneys for plaintiff: *Chester & Urquhart.*

(1) Law Rep. 2 Q. B. 31.

(2) 3 H. & C. 433; 34 L. J. (Ex.) 3.

LEWIS AND OTHERS v. M'KEE.

Nov. 14.

*Shipping—Bill of Lading, indorsement of—Discharge of indorser from liability—
Acquiescence and Waiver.*

The consignee of goods, before the arrival of the ship, indorsed over the bill of lading, but not so as to pass the property in the goods, to wharfingers in these words: "Deliver to W. & K. or order, looking to them for all freight, dead freight, and demurrage, without recourse to us." The plaintiffs, the shipowners, accepted the indorsement, and in pursuance of it delivered the goods to W. & K. :—

Held, that the shipowners were not entitled to sue the consignee for freight.

DECLARATION by shipowners for freight for goods shipped for Falmouth, on the plaintiffs' ship, under a bill of lading signed for the same by the master of the ship, as agent for the plaintiffs, and to be there delivered as ordered (the act of God, &c.,) unto the defendant or to his assigns, on his or their paying freight for the goods as per charterparty, with primage and average accustomed; Averments, that thereupon, and by reason thereof, the property in the goods passed to the defendant, that by the charterparty referred to in the bill of lading, freight was made payable in cash at certain rates therein specified, and that all conditions precedent had been performed. Breach, that although the defendant paid the plaintiffs a portion of the freight, &c., yet he made default in paying the residue amounting to the sum of 67*l*.

Third plea, that by the charterparty it was provided that the plaintiffs should deliver the goods on being paid freight by the receivers of the cargo; that before the ship arrived at the port of call, and before the time had arrived for the delivery of the cargo, the defendant indorsed the bill of lading to certain persons carrying on their business under the firm and style of Messrs. Whatney & Keane, in the words following: "Deliver to Messrs. Whatney & Keane or order, looking to them for all freight, dead freight and demurrage, without recourse to us, (signed) George B. McKee & Co.," and that the plaintiffs accepted the indorsement, and delivered the goods in pursuance thereof to Whatney & Keane, as the persons entitled to the goods, and not to the defendant.

Demurrer and joinder.

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Karslake, Q.C. (*Butt* with him), in support of the demurrer. The plea appears to be framed on the Bills of Lading Act (18 & 19 Vict. c. 111), which reversed the effect of *Thompson v. Dominy* (1), and gave to the indorsement of a bill of lading the effect of transferring the contract. If it alleged that the defendant before the arrival of the goods, indorsed the bill of lading for valuable consideration, and thereby passed the property in the goods to the indorsee, as was done in *Smurthwaite v. Wilkins* (2), the plea might possibly on the authority of that case be held good, although the defendant is here the original consignee of the goods; but it avoids stating this.

[*Watkin Williams*, for the defendant, intimated that he should rely upon the special matters in the plea, and that it might be assumed that *Whatney & Keane* were the defendant's wharfingers, and that the indorsement was only intended to make them receivers.]

If it is admitted that the property did not pass, and that the defendant is not protected by the act, he can only answer the plaintiffs' claim by shewing a mutual agreement, by which the ship-owners consented to take the responsibility of a third person in place of that of the defendant. To do this, the plea must state facts, not only consistent with such an agreement, but inconsistent with any other supposition. But the plea, which admits the defendant's liability, does not even say that by the acceptance of the indorsement and the delivery there was a discharge of that liability, but at the utmost only states facts from which a jury might infer a discharge. The indorsement cannot limit the rights of the ship-owners; for the shipowners, who are entitled to have some person named to them to whom they may deliver the goods, are at liberty to accept that part of the indorsement, and reject the residue. By doing so and delivering the goods accordingly, they lose their lien, but their act is no evidence of an exoneration of the defendant. This view is in accordance with *Shepard v. De Bernales* (3), followed by *Domett v. Beckford* (4), and other cases, where it was held that the words "he or they paying freight for the said goods" in a bill

(1) 14 M. & W. 403.

(3) 13 East, 565; *Abbott on Ship-*

(2) 11 C. B. (N.S.) 842; 31 L. J. ping (9th ed.) p. 340.

(C.P.) 214.

(4) 5 B. & Ad. 521.

of lading, did not on a delivery without payment exonerate the shipper from his liability.

[BRAMWELL, B. Suppose the indorsement to have directed the shipowners to deliver conditionally on the payment of freight, and not otherwise, and unless freight were paid not to deliver.]

It would still be a question for the jury whether the defendant was discharged by the delivery.

Watkin Williams, in support of the plea. (1) The liability of the defendant in this action is founded on the Bills of Lading Act, the intention of which was to transfer the liability, but not to make two persons liable; but the effect of the plaintiffs' contention would be to retain the indorser's liability, in addition to that of the shipper and of Whatney & Keane. But the plea shews an answer. First, it states that by the terms of the charterparty, the plaintiffs were to deliver the goods on being paid freight by the receivers of the cargo; and though this may not exonerate the shipper, it is a good answer for the defendant, who is neither shipper nor receiver of the cargo. Secondly, it is a fallacy to say that the plea admits a liability in the defendant; his liability, which is created by the act, is only an inchoate one, which attaches only on the arrival of the goods, and which may never attach, by reason of his indorsing the bill of lading so as to pass the property (as is admitted), or by reason of the freight not being earned; the defendant's contention is, that this liability has never attached, by reason of his indorsement of the bill before the arrival of the goods. Thirdly, the special indorsement directs a delivery to Whatney & Keane, "looking to them for all freight, dead freight, and damages, *without recourse to us.*" The plea, stating a delivery to them, shews that they have accepted the indorsement, and have therefore made themselves liable, and also shews that the plaintiffs have accepted the terms of the indorsement. That the plaintiffs were not bound to accept this indorsement, proves that by accepting and acting upon it they have consented to be bound by its terms, and to relinquish their claim on the defendant, taking the substituted liability of Whatney & Keane; for it is impos-

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(1) The declaration including prime and average, as well as freight, limiting it to the freight, which the Court permitted.
Williams offered to amend the plea by

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sible to treat these words as inserted in the indorsement for the benefit of the master, which was the ground of decision in the cases of *Shepard v. De Bernales* (1) and *Domett v. Beckford*. (2) They might have refused to act upon it, and held the defendant liable for not accepting the goods; but they cannot put the goods out of his power, and make them subject to the wharfinger's rights against him, and still claim payment from him, contrary to the terms of the order. It is in accordance with the spirit and intention of the Bills of Lading Act to make bills of lading as negotiable as possible, and that object is pursued by upholding such a plea as the present one. Fourthly, the plea may be taken as a denial of the performance of a condition precedent; the goods are to be delivered as ordered, but the terms of the order will not have been pursued if the defendant succeeds.

Karslake, Q.C., in reply.

KELLY, C.B. I can entertain no doubt as to what our decision ought to be in this case. The action is brought against the original consignee under a bill of lading, and originally, upon the facts stated, the defendant was contingently, though not absolutely and in all events, liable to the payment of freight. I say contingently, because the consignment and the bill of lading might have been assigned so as to prevent any claim from being made against him. But in this state of circumstances the defendant indorses the bill of lading to Whatney & Keane, with the words, "looking to them for all freight, dead freight, and demurrage, without recourse to us." The plea, after stating these facts, then alleges that the plaintiffs accepted the indorsement, and in pursuance of it delivered the goods to Whatney & Keane. Now I quite agree that if this statement of facts only raised a case for the consideration of a jury, a case on which the presiding judge ought to take their opinion, the plea would be insufficient. A state of circumstances which is pleaded as a defence in law, must be stated in definite terms, and in such a manner as to shew clearly the legal consequence. But I am of opinion that if the consignee of goods indorses over the bill of lading, and gives notice to the shipowner or the party entitled to freight, and in the indorsement states in

(1) 13 East, 565.

(2) 5 B. & Ad. 521.

express terms that the shipowner or party entitled to freight is to look to the indorsee without recourse to him, and that indorsement is accepted and acted upon without objection or qualification, that acceptance constitutes a defence to any action at law by the shipowner against the indorser. The statement of facts is, therefore, in itself an answer to the plaintiffs' claim, and not merely a statement which might be used to raise an inference of a discharge by the plaintiffs of the defendant.

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BRAMWELL, B. I am of the same opinion. The plea setting out the actual facts of the case, the demurrer raises the question whether it only states facts for the consideration of the jury, or shews a conclusive answer in law. On the ground stated by the Chief Baron, I am of opinion that it shews an answer in law, and I will only add this:—The indorsement of the bill of lading, as stated in the plea, is equivalent to saying, “Deliver to W. & K. on these terms or do not deliver at all.” If so, the owners of the freight might have said, “We will not deliver to W. & K. at all: we don't choose to take their responsibility;” and they would have had a right of action against the defendant for not receiving the goods. But this mode of indorsement seems to me a very reasonable thing; how else is the owner of the goods to act if he wishes to transfer them to the custody of a wharfinger or warehouseman, who is to be solely liable for the freight to the shipowner, and with whom alone he is to be accountable, and entitled and subject to legal rights and liabilities? The shipowner may refuse to accept the substituted liability, but if after examination he takes the order, he must take it on the terms of exonerating the indorser from liability.

CHANNELL, B. I am of the same opinion. In determining whether this plea shews a good legal answer to the plaintiffs' demand, it is not sufficient to say that the facts stated in it are such as to justify, as a matter of evidence, the inference that the plaintiffs discharged the defendant from liability, but the question is, whether they *require* that inference. The plaintiffs might have refused to accept the special indorsement; but if the plea shews that they have delivered according to it, it shews a renunciation

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by them of their right to hold the defendant responsible. Now, after stating the indorsement, the plea goes on to say that the plaintiffs accepted the indorsement, and delivered the goods in pursuance of it to W. & K., "as the persons entitled to the said goods, and not to the defendant." It therefore excludes the assumption of a delivery to those persons as mere agents of the defendant. On these grounds I am of opinion that the plea shews a good answer to the declaration.

PIGOTT, B. If the facts stated in the plea were only evidence from which there might or might not have been inferred a discharge of the defendant by the plaintiffs, the plea would have been insufficient; but on the grounds stated by my Lord and my learned Brothers, I think the plea good.

Judgment for the defendant.

Attorneys for plaintiffs: *Pritchard & Sons.*

Attorneys for defendant: *Cotterills.*

Nov. 22.

THOMPSON AND ANOTHER v. KNIGHT.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Deed of Arrangement—Inequality—Trustees' discretion.

A deed of arrangement entered into under the Bankruptcy Act, 1861, s. 192, between a debtor, his creditors, and a trustee, provided that the creditors should be paid their composition by instalments at two, four and six months from the date of the deed. It also contained a clause conferring on the trustee a discretionary power to pay to all creditors whose debts did not exceed 20% the full amount of their composition in one sum at such time or times as he should think fit:—

Held, that this clause made the deed unequal.

DECLARATION. First count, that the defendant by his order, directed to Messrs. Harris & Co., required them to pay to the plaintiffs or bearer 73*l.* 17*s.*: that the order was duly presented for payment and was dishonoured, whereof the defendant had notice but did not pay the same.

Second count, for money payable for goods sold and delivered, and for money found to be due on an account stated.

Plea, setting out a composition deed entered into after the accruing

of the plaintiffs' claim, under s. 192 of the Bankruptcy Act, 1861, between the defendant (the debtor) of the first part, the creditors of the defendant of the second part, and one Edwin Thomas Bartlett, (a trustee) of the third part; whereby after reciting that the requisite majority of the creditors had agreed to accept a composition of 10s. in the pound, to be paid by three equal instalments payable respectively at the end of two, four, and six months from the date thereof; and that the debtor should deliver to the creditors respectively his promissory notes for the amount of the instalments, to be dated on the day of the date of the deed, and to be payable at two, four, and six months date, and should secure the payment of the notes by depositing a weekly sum of 40*l.* in a certain bank to the credit of the account of Edwin Thomas Bartlett, trustee for the creditors of the debtor, until enough had been paid to the credit of such account to satisfy the amount of the composition and all costs, &c., incurred by the trustee in carrying the deed into effect; and after further reciting that the defendant had, previously to the execution thereof, delivered to the creditors respectively the promissory notes for the amount of the instalments of their respective debts; the debtor covenanted to pay the sum of 40*l.* weekly to the credit of the account of the trustee until enough had been so paid to satisfy the aggregate amount of the composition, upon trust to provide for the promissory notes given by the debtor to his creditors when they should become due, and to pay all the creditors their composition of 10s. in the pound. And it was amongst other things provided by the deed that "in cases where the amount of composition payable to any creditor shall not exceed 10*l.* (*i. e.* where the amount of the creditor's debt shall not exceed 20*l.*), the said Edwin Thomas Bartlett, his executors, &c., shall be at liberty, if he or they shall so think fit, to pay the same in one sum at such time or times as he or they shall think fit." The plea then averred the performance of all the statutory conditions necessary to make the deed binding on the plaintiffs in the same manner as if they had been parties thereto and had executed the same.

Demurrer and joinder.

H. T. Cole, in support of the demurrer, contended that the deed was unequal because the trustee had a discretionary power of paying

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off creditors not exceeding 20*l.* their whole composition of 10*s.* in the pound at once, whilst all the other creditors had to wait two months for the first instalment of their composition. In *Leigh v. Pendlebury* (1), a proviso empowering the trustee to pay in full those creditors whose debts were under 10*l.* was held unreasonable.

R. E. Turner, contra. *Leigh v. Pendlebury* (1) is distinguishable. There, certain creditors were to be paid *in full*. Here, the creditors under 20*l.* are to receive the same composition, viz. 10*s.* in the pound, as the rest. The only discretion of the trustee is as to the time of payment, as to which it is reasonable he should be able to use his own judgment. In *Coles v. Turner* (2), a discretion to trustees under a deed of assignment to determine the amount of dividends, and to pay them in such place and manner as might be thought fit, was held reasonable. Again, it does not appear that there are any creditors in existence of the privileged class, but assuming that there are some of that class, the inequality created by the clause giving this discretion to the trustee, is not so *substantial* as to vitiate the deed: *Keyes v. Elkins*. (3)

H. T. Cole was not called on to reply.

KELLY, C.B. I am of opinion that this deed cannot be supported as a deed of arrangement under the provisions of s. 192 of the Bankruptcy Act, 1861. There are no doubt a great number of these deeds executed daily, and daily forming the subject of discussion, and it is therefore necessary to state clearly the principle on which they are to be held valid or invalid. Now I think it absolutely essential that all the creditors should be placed on an equal footing, especially when I remember that, generally, a great number of them are in these cases bound by an instrument to which they are not parties and to which they have not assented. Under such circumstances, it is only when the provisions of the deed are just and equal that the deed ought to be held binding upon all; but here there is a provision that, where the amount of composition payable to any creditor shall not exceed 10*l.*, the trustee may pay that amount, in one sum, at such time or times as he

(1) 15 C. B. (N.S.) 815; 33 L. J. (C.P.) 172.

(2) Law Rep. 1 C. P. 373.

(3) 34 L. J. (Q.B.) 25.

may think fit. It does not appear how many creditors of this class there may be, but the insertion of the provision, which would otherwise have been idle, gives us a right to assume that there are some. But without making any assumption, here is a power given to pay a certain class of creditors a half of their respective debts, by that payment the whole fund might possibly be exhausted, so that no other creditor could be paid at all. It would be absurd to say under these circumstances that the creditors are in an equal position. Very possibly where there are a number of small debts, and where the debtor and his surety are persons of substance, no harm would happen to any of the creditors, and practically it might be very beneficial that the trustee should pay off the smaller creditors in full. Still that would depend on the amount of the assets and debts and the number of creditors who would have to be paid in full. I am therefore of opinion that this condition is unreasonable, and that the deed is invalid.

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CHANNELL, B. I am also of opinion that the plea is bad. It is clear that if the deed is acted upon, and its provisions carried out, some inequality may arise. Suppose that the deed had provided absolutely that the stipulated composition should be paid to one class of creditors in three instalments, and to another class in one, that would certainly have been an inequality. This deed does not exactly provide that, because here the trustee has a discretionary power left to him. But this circumstance does not, in my judgment, prevent the objection made from prevailing. The case of *Keyes v. Elkins* (1), which has been referred to, does not really affect the question. The great question there was, whether a particular clause was a release, or only a covenant not to sue, and it was objected that, assuming the clause to be a release in terms, it could not so operate in effect, because there was a reservation of the rights of a certain class of creditors. The Court, however, held that it might still so operate, and Cockburn, C.J., says (2):—"The only way the objection could prevail would be by reason of producing inequality among the creditors," thus stating the objection as it has been stated here. Then, he adds, there must be a "substantial" inequality; and in that case "I can well understand

(1) 34 L. J. (Q.B.) 25.

(2) 34 L. J. (Q.B.) at p. 29.

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that there was no substantial inequality; but here I think that there is, and accordingly my judgment is for the plaintiffs.

PIGOTT, B., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Torr, Janeway, & Tagart.*

Attorneys for defendant: *Surr & Gribble.*

Nov. 21.

CHRISTIE v. THE COMMISSIONERS OF INLAND REVENUE.

Stamp Act (13 & 14 Vict. c. 97) Sch. Tit. "Conveyance"—Conveyance upon sale of Property—Dissolution of Partnership—Conveyance by retiring Partner to Co-partner.

A dissolution of partnership being in contemplation between two persons, one of whom was desirous of retiring from business, a deed was entered into, whereby after reciting an agreement for dissolution and that the property of the firm and the share due to the retiring partner had been ascertained, that in respect of such share a specified sum had been paid in cash, and that the remainder was to be secured by a mortgage, and by assignment of certain policies of insurance, it was witnessed that the partnership was dissolved, and that the retiring partner should forthwith release to the remaining partner all his estate in the partnership property, real or personal, and obtain the concurrence in the conveyance of all necessary parties. By an indenture of later date, reciting the previous deed, the retiring partner, "in pursuance of the agreement and in consideration of the premises," conveyed to the remaining partner all his estate and interest in the partnership property and assets:—

Held, that the indenture was liable to ad valorem stamp duty, as a "conveyance upon the sale of property," within the meaning of 13 & 14 Vict. c. 97, sch. tit. "Conveyance."

CASE stated pursuant to 13 & 14 Vict. c. 97, by the Commissioners of Inland Revenue, to enable Charles Peter Christie to appeal against their decision as to the stamp duty chargeable on the indenture hereafter mentioned.

The indenture, dated the 21st of March, 1866, was made between John Back of the first part, Robert Hunt of the second part, Philip Longmore and Matthew Skinner Longmore of the third part, and Charles Peter Christie of the fourth part. It appeared from the recitals, that Messrs. Back and Christie had dissolved a partnership in the trade of brewers and wine merchants previously existing

between them as from the 29th of September, 1865; and that by a deed, dated the 20th of March, 1866, made between them—after reciting that a stock account and balance-sheet of the partnership up to the 29th of September, 1864, had been taken and made and duly signed by the partners, shewing all the freehold, copyhold, and leasehold and other property, and also the debts and credits of the partnership, the amount of profits up to the 29th of September, 1864, and the respective shares of the partners and the loans of each of them to the firm; that, in June, 1865, John Back being desirous of retiring from the firm, the presumed amount due to him on the 29th of September following was ascertained, and appeared to be 110,000*l.*; that he had proposed to retire as from the last-mentioned date upon the conditions that he should be paid 10,000*l.* by Charles Peter Christie in cash, and have the remainder of the 110,000*l.* found to be due to him secured by Charles Peter Christie by a mortgage of part of the assets of the firm, and by the assignment of certain policies of insurance; that Charles Peter Christie had agreed to a dissolution of partnership on these conditions; that he had paid to John Back 10,000*l.* in cash, and that the terms of a mortgage of part of the assets of the firm and of the assignment of the policies had been finally arranged; and that it was intended that such mortgage should be executed by Charles Peter Christie as soon as John Back and certain other persons who were trustees of a portion of the property to be comprised in the mortgage should have conveyed the same to him—it had been witnessed, 1st, that the partnership was dissolved as from the 29th of September, 1865; 2ndly, that John Back should forthwith release to Charles Peter Christie all his estate and interest in the freehold, copyhold, and leasehold estates, stock in trade, &c., belonging to the late co-partnership; 3rdly, that the concurrence in the conveyance of the trustees of certain portions of the property should be obtained; 4thly, that Charles Peter Christie should, within seven days from the date of the deed in recital, or as soon after as might be, execute a mortgage on the terms arranged; 5thly, that Charles Peter Christie should indemnify John Back against the debts and liabilities of the firm. After further reciting that the assets of the partnership consisted, amongst other things, of certain freehold and copyhold lands and

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hereditaments and leaseholds, and that some of them were vested in Philip Longmore and Matthew Skinner Longmore, being the executors of Peter Christie, a deceased partner, and in Robert Hunt, a retired partner, the indenture witnessed that, in pursuance of the agreement, and in consideration of the premises, John Back, Robert Hunt, Philip Longmore, and Matthew Longmore, according to their several interests and estates, granted and released, remised and quitted claim, and assigned to Charles Peter Christie all the freehold, copyhold, and leasehold property in the schedules to the indenture underwritten, then forming part of the assets of the firm, to hold to the use of him, his heirs, &c., for ever.

The indenture contained the usual covenants for title by John Back, Robert Hunt, Philip Longmore, and Matthew Longmore, and, as to the leaseholds, by Charles Peter Christie to pay rent and perform the covenants in the leases. The schedules annexed to it contained a detailed description of the property comprised in the conveyance.

Charles Peter Christie presented this indenture to the Commissioners of Inland Revenue, under the provisions of 13 & 14 Vict. c. 97, s. 14, and desired their opinion as to the stamp duty with which it was chargeable. He submitted that the transaction evidenced by it was not a "conveyance upon the sale" of property within the meaning of the schedule of that act, and that the indenture was therefore only chargeable with a duty of 1*l.* 15*s.* (besides progressive duty) as on a deed not otherwise charged by any act or acts. The Commissioners were of opinion that the indenture was chargeable under 13 & 14 Vict. c. 97 (and 28 & 29 Vict. c. 96, s. 1, which altered the amount of duty), as a "conveyance upon the sale" of property, with an ad valorem duty of 5*s.* in every 50*l.* in respect of the purchase or consideration money therein expressed, and accordingly assessed the stamp duty on it at 550*l.* 10*s.* (besides progressive duty), whereupon Charles Peter Christie paid that sum to them, but having declared himself dissatisfied with their decision, required them to state this case. The question for the opinion of the Court was, whether the indenture of conveyance of the 21st of March, 1866, was chargeable with ad valorem conveyance duty in respect of the sum of 110,000*l.* therein mentioned, or on any other, and what sum.

Joshua Williams, Q.C. (Jolliffe with him), for the appellant.

This transaction is not a conveyance "upon the sale" of property within the schedule, tit. "Conveyance," of 13 & 14 Vict. c. 97 (1), which contains no express terms applicable to it. Without "clear words" a revenue act cannot impose a duty on the subject: per Pollock, C.B., in *Marquis of Chandos v. Commissioners of Inland Revenue*. (2) It is an arrangement between Messrs. Back and Christie to facilitate a dissolution of partnership. The retiring partner receives the share of profits due to him on a balance of account, and also is repaid moneys advanced by him to the firm. In return he executes a conveyance, passing out of himself partnership assets to which he is no longer entitled. The contract of partnership involves an implied stipulation, that the property belonging to the partners shall be sold and divided upon the dissolution. Each partner has a right to have the property realised, and to be paid his share: per Kindersley, V.C., in *Darby v. Darby* (3); and when a retiring partner, on receiving that share, executes a deed assigning his interest to his co-partner, there is nothing *sold* by him in the ordinary acceptation of the word: *Belcher v. Sikes* (4); 2 Lindley on Partnership, 713. The case is similar to that of a partition: *Henniker v. Henniker* (5); or of a family arrangement; neither of which, although money often passes between the parties, are liable to ad valorem duty as sales: *Denn d. Manifold v. Diamond* (6); *Blandy v. Herbert* (7); *Massy v. Nanney*. (8) In *Potter v. Commissioners of Inland Revenue* (9), an assignment by deed by one partner to another of the goodwill of a trade was held to be a

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(1) The title imposes a certain specified duty (altered in amount by 28 & 29 Vict. c. 96, s. 1) upon a "conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon, any lands, tenements, rents, annuities, or other property; that is to say, for and in respect of the principal, or only deed, instrument, or writing, whereby the

lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her, or their direction."

(2) 6 Ex. at p. 479.

(3) 3 Drew. at p. 505.

(4) 6 B. & C. 234.

(5) 1 E. & B. 54.

(6) 4 B. & C. 243.

(7) 9 B. & C. 396.

(8) 3 Bing. N. C. 478.

(9) 10 Ex. 147.

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conveyance "upon the sale of property;" but there the parties made an *express* bargain and sale, and precluded themselves from contending that the transaction was anything but a sale. *The Furness Railway Company v. Commissioners of Inland Revenue* (1) is distinguishable on the same ground.

The Attorney General (Crompton Hutton with him), was not called upon for the respondents.

KELLY, C.B. This case has been very ingeniously argued, but I am of opinion that it does not admit of any reasonable doubt. In all these cases, it appears to me, that the substance of the transaction is alone to be considered upon the question whether the instrument is liable to the stamp duty under the statute, and the substance of this transaction collected from the deed certainly seems to me to be a sale by Mr. Back to Mr. Christie of Mr. Back's interest in the partnership property for the sum of 110,000*l*. I can see no distinction with respect to liability to stamp duty between a sale on the part of Mr. Back to Mr. Christie, who happened to be the continuing partner, and a sale by Mr. Back to any other person with whom Mr. Christie might have been disposed to enter into partnership, and to whom Mr. Back might have been willing, for a certain consideration, to assign and convey the whole of his interest in the partnership property. It seems that upon the contemplated retirement of Mr. Back, a balance-sheet was made out which enumerated the whole of the partnership property, and reference was also made in the balance-sheet, which, however, is not before the Court, to some loans by one or the other, or both partners, to the partnership fund. It does not appear what was the amount of any loan, if loan there was, by Mr. Back to the partnership, or whether that money was allowed to remain in the concern, or was paid off, or whether it was taken into consideration in the estimate of the whole of the partnership property, or the interest of Mr. Back in the partnership property, or whether it was dealt with in any other way which might have been thought best between the partners. We cannot, therefore, in this case, upon the terms of this deed, treat it as an element in the consideration of the question. The result, therefore, is that this is simply a sale by Mr. Back to

Mr. Christie of his interest in this partnership property for the consideration or sum of 110,000*l*. Now, certain cases have been referred to by Mr. Williams, which he contends either establish a different principle or tend to a different conclusion. He has referred to the well-known case in which partnership property, although it may consist in part, or even wholly, of real estate, is as between the partners upon a dissolution, or any other settlement that may take place between them, dealt with, not as land, but as money. The fact is, that case is only the same as the case of land devised to be sold to be converted into money, where that is assumed to be done which is directed by will to be done, and the property is treated as money. But, on the sale of such a property, who can doubt that the conveyance by which it is sold would be subject to an ad valorem stamp duty in reference to the amount of the consideration for the purchase and sale? Then, again, several cases of family settlement have been referred to, and these, no doubt, have been determined upon a different principle. They have been held to be exempt from stamp duty, but they are cases, looking, as I say we ought to look, to the substance of the transaction, which do not resemble a sale. They are, in fact, merely arrangements between different members of the family. A father, for example, may convey to his son a landed estate worth 20,000*l*. a year, and he may require his son to make a settlement to a daughter or to younger children of a greater or less sum. But that does not, in truth, constitute the consideration at all, far less the price or purchase-money of the estate which the father conveys to the son. It would, therefore, be really to treat the case as something different from what it is in intention and in fact to hold that anything that may pass out of a grantee of property under a family settlement is to be treated as the purchase-money for that which is conveyed to him, and is to be liable to stamp duty. I think, therefore, that each class of cases referred to is distinguishable both in principle and in fact.

It only remains to refer to the third case which has been put to us, namely, the case of a partition. Now, a partition is totally unlike a sale and purchase of a landed estate. Persons who have some interest in property held under a tenancy in common, or in any other joint manner or character, are very frequently content to take

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something far less in value than the interest which they possess in the common property, in order that what they are possessed of they may possess in severalty, independently of all other persons; and where persons come to such an arrangement, whether they agree at once to divide the property into equal portions, or whether one is to pay a sum of money to the other or to all the others, the sum which is paid is not paid as the price or purchase-money of the property which he who pays it takes under the partition. There the real consideration, looking to the substance of the transaction, is the partition itself, and the power which the party in question takes to hold the property in severalty, and independently of those who had heretofore been his fellow-holders.

Under these circumstances it appears to me, looking at this conveyance, that it is a mere ordinary conveyance and sale of a valuable interest in a property which constituted, before the conveyance, the partnership property. The conveyance is made to the continuing partner, but, whether made to him or to any other person, it is for all purposes a sale of the property in question in consideration of the price or purchase-money of 110,000*l*. I am of opinion, therefore, that the respondents are entitled to judgment.

CHANNELL, B. I also think that the respondents are entitled to judgment. We are not called upon in this case to say what would have been the state of things in the case of one partner paying another out, and where there might have been no conveyance. Here there has been a conveyance, and the only question therefore that can arise is, whether it is a "conveyance on the sale" of property within the meaning of the act of parliament. I admit that we are not to endeavour to fix the subject with liability to duty by any strained construction of the act. At the same time, I agree with the Lord Chief Baron that we have to look to the substance of the transaction. And here it appears to me that the bargain between the parties, which has been carried out by this conveyance, is a bargain that the one should sell to the other his interest in the firm, and all the property of the firm, for a certain ascertained sum of 110,000*l*. A part of that was to be secured by mortgage, and the amount was arrived at by a stock account having been taken, but I am unable to see that that

makes any distinction in the case. If one partner, without taking any account, had said to the other: "I will sell all my interest at a sum named," and there had been a conveyance carrying out that arrangement, it is conceded that duty would be payable. All that has been done in this case seems to me to have been to ascertain what would be the fair sum for the one party to receive and for the other to give, so that the retiring partner might relinquish all his interest in the business, and the entire property might vest in the other partner. For these reasons, without adding further to what has been said by the Lord Chief Baron, I think the respondents are entitled to the judgment of the Court.

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PIGOTT, B. I am of the same opinion. I quite agree that we must look to the substance of the transaction. Now here, the substance of the transaction is as follows:—Mr. Back wished to retire, and Mr. Christie wished to carry on the whole business. Mr. Back's interest in the property of the concern was ascertained to be worth 110,000*l*. In consideration of Mr. Christie paying him 10,000*l*. in money and, undertaking to give him, in respect of the remaining 100,000*l*., the security of a mortgage, and also the further security of certain policies of assurance, he conveyed his interest in the property for the amount of 100,000*l*. This appears to me to be substantially a conveyance of property "upon a sale." If this transaction had taken place between a third person, not a member of the firm, and Mr. Back, there would not have been a doubt about the stamp duty being payable, and, in my judgment, the fact of its taking place between Mr. Back and an old member of the firm, makes no difference. I think, therefore, that our judgment must be for the respondents.

Judgment for the respondents.

Attorneys for appellant: *Bower & Cotton.*

Attorney for respondents: *Solicitor to Commissioners of Inland Revenue.*

Nov. 26.

CLAY v. OXFORD.

Practice—Parties—Amendment—Dead Plaintiff—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 222.

Where an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs.

THIS action was commenced on the 10th of May, in the name of John Clay, as plaintiff. It was afterwards discovered that John Clay had died before the date of the writ, and on the 14th of June a summons was taken out to substitute the names of his executrix and executors as plaintiffs. This summons was abandoned; but on the 7th of November another summons to the same effect was taken out before Martin, B., who made the order prayed. It was desired to have the action continued, in order that some depositions which had been taken before the discovery of John Clay's death might be read in the cause.

J. A. Russell, having obtained a rule nisi to rescind this order,

Jones, Q.C., shewed cause. The amendment asked is not beyond what might have been made at common law in cases where, as in this case, a peculiar reason of convenience operates in favour of continuing the existing suit. In *Corne v. Malins* (1) plaintiffs were added to save the right of action, and for the same reason in *Brown v. Fullerton* (2) the official assignee was added, whose right was, as the right of the applicant is here, a derivative right. But, at least, the Court has power under section 222 of the Common Law Procedure Act, 1852, to make the amendment. The addition of parties in *Blake v. Done* (3) was really a substitution, and the same may be said of *La Banca Nazionale v. Hamburger* (4), since a corporation is specifically different from a natural person.

J. A. Russell, in support of the rule, was not called upon.

KELLY, C.B. It may, perhaps, be regretted that the Common Law Procedure Act has not authorized the substituting of one

(1) 6 Ex. 803; 20 L.J. (Ex.) 434.

(2) 13 M. & W. 556.

(3) 7 H. & N. 465; 31 L.J. (Ex.) 100.

(4) 2 H. & C. 330.

plaintiff for another, or one defendant for another, in a case like this; but we have no power, either by common law or by statute, to do what is asked. Since the Common Law Procedure Act of 1852, by the 34th and following sections, in express terms enables the Court to add or to strike out any number of plaintiffs, and by the 136th and following sections, gives a similar power of allowing the representatives of a deceased plaintiff to continue the suit, but contains no provisions in any part of it for substituting one plaintiff for another, one suing in a representative capacity for a deceased man who never was a party, I cannot but think that no such power was meant to be given. The rule must, therefore, be made absolute.

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BRAMWELL, B. I am of the same opinion. I think such a substitution was not within the intention of the act. This is not a case where it can be said that persons, not formally entitled to be parties, have brought an action to try certain matters perfectly well known to both sides, which is the explanation of *Blake v. Done* (1) and *La Banca Nazionale v. Hamburger*. (2) But here the plaintiff is altogether wrong, or rather there is no plaintiff; the man in whose name the action was brought was dead. It cannot be said that this is an amendment "necessary for the purpose of determining in the existing suit the real question in controversy between the parties," nor is this an application made between the parties to the suit; for there is no plaintiff, and, therefore, no existing suit, and no question in controversy between the parties. If we could see some person suing who had a beneficial interest in the claim made, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted.

CHANNELL, B. I also think we have no jurisdiction to make this order. The sections previous to section 222 do not affect the question, and the power to amend must be claimed under that section, if at all. That section does not provide in terms for such

(1) 7 H. & N. 465; 31 L. J. (Ex.) 100.

(2) 2 H. & C. 330.

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a case, and, as in the earlier sections the subject of the alteration and substitution of parties is discussed with great care and accuracy, and this case is not mentioned, we must infer that the power was not intended to be given.

PIGOTT, B. I was at first disposed to view section 222 as giving us the power to make the amendment; but, on looking more carefully at the act, and considering the specific provisions that are made for the nonjoinder and misjoinder of plaintiffs, I think that, on the true construction of that section, it does not confer that power upon us.

Rule absolute.

Attorneys for applicants: *Uptons, Johnson, & Upton.*

Attorney for defendant: *J. W. Nicholson.*

Nov. 19.

AGRA AND MASTERMAN'S BANK, LIMITED v. LEIGHTON.

Bill of Exchange—Failure of Consideration—Satisfaction of Bill—Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67)—Leave to appear and plead—Practice.

In an action commenced by writ of summons under the Bills of Exchange Act, 1855, leave to appear and plead will be given whenever there is an apparently real defence, and the condition of bringing the money into Court, or finding security, will only be imposed where there is reason to doubt its *bona fides*.

Where, in an action by an indorsee, leave has been given on affidavits shewing a good defence as between the original parties to the bill, and stating circumstances which raise the inference that the plaintiff is not a holder for value, or is for any other reason liable to be opposed by the same defence, affidavits in answer will be received to contradict that inference, and will, if clear and cogent, be ground for rescinding the leave.

In an action by the indorsee of a bill of exchange against the acceptor, a plea stating the satisfaction of the bill by the drawer will not be good unless it shews that the plaintiff is not the lawful holder of the bill.

In such an action a plea stating that the bill was given for goods to be supplied by the drawer, and that only part of the goods were supplied, of which the defendant accepted a part, and that by reason of the non-completion of the contract the part supplied became valueless to him, and also shewing that the plaintiff is not a holder for value, will be good, provided also (per Channell and Pigott, BB.) the value of the goods accepted is shewn to be a definite sum.

THIS was a consolidated action on two bills of exchange for 3000*l.* each, dated the 19th of December, 1865, drawn by the

Blakeley Ordnance Company upon, and accepted by, the defendant, payable respectively at three and four months after date, and indorsed to the plaintiffs. Both actions were commenced by writ under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67).

The writ in the first action was issued on the 24th of April and served on the 9th of July. On the 20th of July the defendant obtained leave to appear and plead on his affidavit, stating that the bill sued on, and also the bill sued on in the other action, together with other bills, were drawn by T. A. Blakeley, for the Blakeley Ordnance Company, upon the defendant, and indorsed to the plaintiffs by the Blakeley Ordnance Company, Limited, which had taken over the assets and liabilities of the former company; and that he had been informed by T. A. Blakeley, who was the manager of the Blakeley Ordnance Company, Limited, that the plaintiffs had been paid the full amount of the bills by the Blakeley Ordnance Company, and had no claim whatever on the bills against either company; and further stating to the effect of the fourth plea, which is set out below.

On the 8th of August the plaintiffs took out a summons to rescind this order, or for the defendant to bring the amount claimed into court. The summons was adjourned several times, and affidavits were filed on both sides; on the part of the plaintiffs, to the effect that they were entirely ignorant of the defendant's dealings with the Blakeley Ordnance Company, and denying the payment of the bills by that company, or by any person on their behalf; on the part of the defendant, to the effect that a sum of 8000*l.*, which had been remitted through the plaintiffs' bank, had been retained by them exclusively in payment of these bills.

Copies of the accounts of Blakeley, and of the Blakeley Ordnance Company, Limited (1), with the plaintiffs were afterwards produced; and from them it appeared that the bills had been discounted by the plaintiffs for Blakeley on the 23rd of December, 1865, and the amount placed to his credit; that he was also debited with the amount of the two bills when they were dishonoured respectively, on the 23rd of March and the 23rd of April, 1866; and that bills

(1) Blakeley and the Blakeley Ordnance Company were treated as identical, and the company was sup-

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to the amount of 8442*l.*, discounted by the plaintiffs on the 11th of May, were also placed to his credit, this being the sum of 8000*l.* referred to in the affidavit; and it also appeared that at this date (11th of May) there was a balance on the accounts of about 100*l.* in favour of the plaintiffs, which was increased to 470*l.* at the closing of the account three days later.

On the 29th of August the following order was made upon the summons: "No order upon payment into court, or security for 3000*l.* in six weeks;" and the two actions were consolidated. (1)

On the 9th of October a summons was taken out by the defendant, to vary this order by striking out so much of it as required payment or security, or to extend the time limited. This summons was adjourned into court, and *M'Intyre*, in this term (Nov. 8), obtained a rule nisi in the terms of the summons.

On the 25th of October the plaintiffs delivered their declaration in the consolidated action, declaring upon the bills as drawn by the Blakeley Ordnance Company upon the defendant to their own order, and indorsed by that company to the plaintiffs. To this the defendant pleaded, first, denial of acceptance, second, denial of indorsement, on which the plaintiffs joined issue; and also the following pleas:

Third plea. That whilst the bills were in the hands of the plaintiffs, as holders, one T. A. Blakeley paid to the plaintiffs the full amount due to them in respect of the bills, and became entitled to become the holder of them, yet the plaintiffs did not deliver the bills to him, but are now suing on them without his authority, or the authority of any other person entitled to maintain an action upon the bills, or either of them.

Demurrer and joinder.

Fourth plea. On equitable grounds, that the bills were, and each of them was, accepted for the price of certain goods to be sold to, and shipped for and on account of the defendant, to Japan, and on the faith that the shipment of such goods had then been completed by the Blakeley Ordnance Company; that after the acceptance of the bills, and before the same or either of them became due, the company refused to complete the shipment, and only shipped

(1) The proceedings at chambers the same summonses being taken out, had in fact taken place in both actions, and orders made, in both.

certain of the goods, and that the defendant only received and accepted a certain portion of the last-mentioned goods, amounting in price and value to 1200*l.*; that by reason of the non-completion of the shipment, the goods actually shipped became useless to the defendant, who gave notice to the company that he would not accept and receive the residue of the goods so shipped; that except as aforesaid there never was any value or consideration for the acceptance or payment of the bills, or either of them, by the defendant; that whilst the bills were in the hands of the plaintiffs, as holders, one T. A. Blakeley, as agent of the company, paid to the plaintiffs the full amount due to them in respect of the bills, and the company then became entitled to be the holders of the bills, and the plaintiffs have since held them, without any value or consideration whatever; and as to the sum of 1200*l.*, the price and value of the goods accepted and received by him from the company, the defendant pleaded a set-off of equal amount against the company.

Demurrer and joinder.

Nov. 19. The rule and the demurrers came on to be argued together.

Cohen (*Coleridge*, Q.C., with him), in support of the demurrers. First, as to the fourth plea. It amounts to no more than a statement of a partial failure of consideration, which cannot be pleaded to an action on a bill of exchange: *Byles on Bills*, pp. 119, 120, 8th edit. The statements of the plea must be taken strictly, and so taken they only shew a breach of contract, for which the defendant is entitled to recover unliquidated damages. He cannot repudiate the contract, for he has accepted part of the goods under it, and for these he is liable according to its terms; the drawer's performance has only been defective, not wholly wanting, and the rule cited therefore applies. This being so, his defence is not mended by being pleaded equitably, for equity here follows the rules of law: *Glennie v. Imrie*. (1) This objection applies to the whole plea; but that part of it which relates to the set-off is open to this further objection. The defendant's contention must be, that the plaintiffs, having been paid the full amount of the bills

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by the company, hold the bills as trustees for them, and are now suing in that character; but in that case the set-off, which is a debt from the company, the cestuis que trustent, is not between the parties to the action.

[CHANNELL, B. This is precisely the converse case to *Cochrane v. Green* (1), where a defendant was allowed to set-off a demand due from the plaintiff to the defendant through the defendant's trustee.]

The third plea is clearly bad on the authority of *Jones v. Broadhurst* (2), which shews that satisfaction by the drawer furnishes no defence to the acceptor, whose contract with the indorsee is entirely distinct and separate. It does not aver that the payment was made at the request or on behalf of the defendant (3), nor that there was in the payment any privity between him and Blakeley (4), nor that the payment was on any contract that the bill should be delivered up (5); nor does it even say that the plaintiffs are suing against the will or contrary to the order of Blakeley, but only that they are suing "without his authority." All that appears is, that some stranger has paid the amount of the bills to the plaintiffs, who may be now suing (consistently with the plea) as trustees for him.

Sir George Honyman, Q.C. (M'Intyre with him), in support of the pleas. As to the fourth plea, the failure of consideration is plainly such that it would be a good defence in an action against the defendant by the company; for it is stated by the plea, and admitted by the demurrer, that by reason of the non-completion of the shipment, the goods shipped became valueless to him. It is true that of what was shipped the defendant took part; but that only makes him liable to pay for the goods taken, and does not waive his right to insist on the total failure of consideration which had already occurred. The case, therefore, differs from the case of *Glennie v. Imri* (6), where that which the plaintiff complained of in his bill was, a defect in the quality of the goods supplied, which was only matter of a cross action. But it is also distinguishable from that case on the ground that, even admitting the consideration not to

(1) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.

(2) 9 C. B. 173.

(3) 9 C. B. at p. 179.

(4) 9 C. B. at p. 180.

(5) 9 C. B. at p. 183.

(6) 3 Y. & C. 436.

have totally failed, the sum to be deducted is a definite sum. For the plea says that the goods taken amounted in value and price to 1200*l.*; but this is the only part of the consideration that has been performed; and if the sum of 1200*l.* is deducted from the total amount of the contract, it leaves a definite residue to be deducted from the sum due on the contract. It therefore falls within the exception included in the statement of the rule in *Bayley on Bills*, p. 505, 6th ed.—that “the partial failure of consideration will constitute no defence, if the quantum to be deducted on that account be matter, *not of definite computation*, but of unliquidated damages.”

The third plea is also good. The statement is here made which was wanting in the plea in *Jones v. Broadhurst* (1), that Blakeley became entitled to become the holder of the bills, and that the plaintiffs are suing without the authority of any person entitled to maintain an action upon the bills. This statement is inconsistent with the notion that the bills have been left in the hands of the plaintiffs in order that they might sue upon them.

Cohen, in reply, cited *Moggridge v. Jones*. (2)

The Court then directed that the rule should be argued.

Cohen shewed cause.

Honyman, Q.C., was not called upon.

BRAMWELL, B. This rule must be made absolute. The intention of the Bills of Exchange Act was, that where there was no pretence for a defence, the party sued should not be allowed to defend, and the holder should have judgment as of course; but that, if the defendant had a real, I do not say good, defence, he should have leave to appear and set it up. As cases, however, sometimes occur where an apparently real defence is shewn, but its sincerity is doubtful, there the defendant is let in to defend only on the terms of his bringing the money into court. Now I cannot say that there is here no pretence for a defence; on the contrary, I think there is a good pretence. I do not say that the defence is well founded, but it raises a fair question between the parties. But, further, it often happens that a man comes in before the judge, and shews a good defence as between the parties to the bill, and also states his belief, from certain circumstances of more or less credit, that the plaintiff

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(1) 9 C. B. 173; see p. 182.

(2) 14 East, 486.

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is not a holder for value; afterwards the plaintiff comes and shews that belief to be groundless. In such a case the leave to appear is rescinded, because it appears that the leave was originally given to him on a supposed state of facts which is shewn to be erroneous. Now, if the plaintiffs had shewn that they were holders for value, we ought to have rescinded the order for leave to appear, or made it conditional; but to my mind they do not shew that there is no question on this point. For on the accounts it appears that on the 23rd December they discounted these bills for 6000*l.* for Blakeley, and, on the bills being dishonoured, debited his account with the amount. Now certainly that was not payment; but afterwards Blakeley discounts bills with them to the extent of 8000*l.*, which at that time very nearly balanced the accounts between them. There were subsequent drawings to a small amount, resulting in a balance against Blakeley of about 470*l.*; but that is all. If that is so, there is, on the one hand, a fair question whether the defendant has a good defence against Blakeley; on the other hand, as it appears that the plaintiffs have no claim against Blakeley, their interest and Blakeley's in this sum are the same, and it is not clear that they have any right of recourse against the defendant; for if the old dishonoured bills ought to have been handed over to Blakeley, the plaintiffs can have no claim upon them against the defendant. At all events, this is not a case of the kind intended by the act, that is, a case where there is no real question between the parties.

CHANNELL, B. I am of the same opinion. I do not understand that the Bills of Exchange Act requires or authorizes the judge to try the merits of the action; it requires leave to appear to be specially granted to the defendant only in order to prevent vexatious and unfounded defences. Now, on the affidavits before the judge, the leave to appear was originally well granted, the defendant stating facts not inconsistent with a good defence on the merits. The question, therefore, is, whether the leave originally given ought to remain, or whether it ought to be rescinded, or allowed to stand on terms. The effect of the order appealed from was to clog it with a condition; and, on the best consideration I can give to the question, I think there is no sufficient reason for imposing that

restriction. The order, as at first made, was properly made, and the ground on which it was made is not displaced by the affidavits. Leave to appear is often given on a statement of circumstances, which would be a conclusive defence as between the original parties to the bill, but which are not so in an action by the holder, unless he is shewn not to be a holder for value. As to this latter point, the evidence which the defendant adduces naturally cannot be so cogent, though it may be sufficient to raise a presumption. In such a case it is an exception occurring in every day's practice, to admit the plaintiff's answer on affidavits, not to displace cogent evidence, but to answer that part of the defendant's statement which is necessarily qualified and doubtful. The plaintiffs' affidavits here fail to do so, and the rule must therefore be made absolute.

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PIGOTT, B. *Primâ facie*, the defendant shows a bonâ fide defence, and, if so, he ought to be allowed to set it up, without having the terms imposed upon him of bringing the money into Court.

*Rule absolute to vary the order by striking
 out the condition.*

The Court then delivered judgment on the demurrers.

BRAMWELL, B. I think the third plea is bad. The plea is, if I may say so, bad because it is not good, when the pleader might so easily have made it good if he had chosen. To make it good this meaning must be given to it—that the plaintiffs were not the lawful holders of the bills at the time when the action was brought. But this is not the true meaning of the plea, because the payment of the full amount due, which is the ground of the defence stated, has no such necessary consequence. The payment may have been made on account, or for many different reasons, and not as a satisfaction of the bills. But it is further said, that Blakeley by such payment became entitled to be the holder of the bills. Possibly; but it is quite consistent with this that although, if he had insisted upon it, the plaintiffs must have delivered the bills to him, yet he did not so insist, and they continued to have the de facto possession of the bills, and were entitled to the remedies of holders against the defendant. Whether, if the plea had alleged that the plaintiffs

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were not, at the commencement of the action, the lawful holders of the bills, it would have been a good plea, I will not say; but I can conjecture the reason why this was not said. The bills may have been purposely left in the hands of the bankers, as a further security in the event of the other discounted bills being dishonoured; so that though, in one sense, all was paid, yet it would not be true that the plaintiffs were not entitled to sue. I must therefore hold the plea to be bad, because I cannot see that it is good.

But I think the fourth plea good, and I understand it thus: "I accepted these bills in payment for goods sold to me at certain prices by the drawers, and which were to be shipped to me by them; and, in fact, all which were to be shipped were not shipped, and of those shipped I only took a portion; and, the whole not being shipped, that portion became valueless to me, and I therefore refused to take the residue." Now, if the plea shews a good answer as to all except the 1200*l.*, the price of the goods taken, it is a good plea. Does it, then, shew such an answer? Suppose I order 1000 pairs of stockings and 1500 pairs of gloves to be sent out to me; the stockings are sent, and I take them; but only right-hand gloves are sent, and I do not take those. The consideration for the bill might have wholly failed, for I might have rejected all; but since I took a part, I must pay for them. I was not bound to take that part, but, because I did take them, I am bound to pay, not by the original contract, but by the fact of taking them. If this is the meaning of the plea, as I think it is, it is a good plea, and judgment must be for the defendant on the demurrer to this plea, for the plaintiffs on the demurrer to the third.

CHANNELL, B. I am of the same opinion. On the third plea I have had some doubt whether it might not be upheld, as alleging that the plaintiffs at the commencement of the suit were not holders of the bills—not saying that they were not in possession of the bills, but that they were not holders with a right to sue. But, on the ground suggested by my Brother Bramwell, I think the plea fails. If upheld at all, it must be on the ground that the plaintiffs were tortious holders of the bills; but it stops short of stating circumstances which require that inference. It does not say that the plaintiffs sue against the will of Blakeley, but only

that they sue without his authority; and it is consistent with this averment that Blakeley has not interfered, and that they are therefore entitled to sue.

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On the demurrer to the fourth plea, the defendant is, I think, entitled to judgment. The substance of the plea is this: "I accepted the bills on the faith of goods being shipped at certain prices; some were shipped, but not all; I did not take to all the goods shipped, but to a portion of them, and for those I am bound at law and in justice to pay, but not for the others." Then the plea is good as to all except the goods appropriated. In holding thus I do not mean to throw any doubt upon the cases which decide that, where the defendant seeks to discharge himself on the ground of a partial failure of consideration, he cannot do so by setting up a partial failure to the extent of unliquidated damages. But here, looking to the language of the plea, the sum in respect of which the set-off is claimed is made by the pleading a definite sum, amounting to 1200*l*. If the plea had gone on to say, "amounting, according to the contract, to 1200*l*," there would have been no doubt; but, although the language is not so specific as it should be, yet as it says, not "amounting" merely, but "amounting in value and *price* to 1200*l*," the sum is made sufficiently definite to take the case out of the rule which does not allow a claim for unliquidated damages to be pleaded to a bill of exchange. As to the set-off, our decision will be in accordance with the rule to be deduced from the case of *Cochrane v. Green* (1); there the cestui que trust was allowed to set up his trustee's claim against the plaintiffs; here, conversely, we allow the defendant to set up against the trustee's claim the debt due from the cestui que trust.

PIGOTT, B. I am of the same opinion. It is consistent with the facts stated in the third plea that the plaintiffs are rightfully in possession of the bills, with the ordinary rights of action of holders; it is therefore bad. But the fourth plea is good. The rule laid down in *Bayley on Bills*, as to a partial failure of consideration not being a good defence to a bill of exchange, does not apply to cases where the amount to be deducted is a matter of definite computation, but only to cases of unliquidated damages. Looking at the

(1) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.

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language of this plea, the amount is clearly stated to be a matter of definite computation, and the plea is therefore good.

*Judgment for plaintiffs on demurrer to third plea ;
 for defendant on demurrer to fourth plea.*

Attorneys for plaintiffs: *Uptons, Johnson, & Upton.*

Attorneys for defendant: *Courtenay & Croome.*

Nov. 23.

WOOD AND ANOTHER v. PRIESTNER.

Guarantee, Continuing—Future Debt—Construction.

The defendant's son being indebted to the plaintiffs for coals supplied on credit, and the plaintiffs refusing to continue to supply coals unless guaranteed, the defendant gave this guarantee: "In consideration of the credit given by the H. G. C. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*; and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding the sum of 100*l.*":—

Held, a continuing guarantee.

ACTION on a guarantee. The defendant's son, a coal-dealer, for some time previous to the giving of the guarantee, purchased coals of the plaintiffs, who traded under the name of the Hindley Green Coal Company, settling with them on monthly accounts. On the 10th of June, 1861, he was in debt to them on the March, April, and May accounts, in the sum of about 170*l.*, and some difficulty arising between him and the plaintiffs, they refused to continue to supply him with coals unless he gave security. He paid 9*l.*, and accepted a bill of exchange at three months for 61*l.*; and one of the plaintiffs having written out the guarantee sued on, the son procured the defendant's signature to it.

The guarantee was as follows:—"Wilmslow, June 10, 1861. In consideration of the credit given by Messrs. The Hindley Green Coal Company to my son, Mr. James Priestner, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his nonpayment (1) of any accounts due, I bind myself by this note to pay to the Hindley Green Coal Company whatever may be owing, to an

(1) This word was taken to have been written for *payment*.

amount not exceeding the sum of 100*l*. (Signed) Wm. Priestner." There was no evidence that the defendant knew the state of accounts between his son and the plaintiffs.

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The plaintiffs thereupon continued to supply the son with coal on credit until, in June, 1865, he executed a deed of assignment under the Bankruptcy Act, 1861. He then owed the plaintiffs 349*l*., of which the assets would pay only a very small fraction. The debt due at the date of the guarantee appeared to have been discharged by subsequent payments. The son had since died.

The case was tried before Martin, B., at the Lancashire summer assizes, and a verdict was entered for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit on the ground that the guarantee was not a continuing guarantee. A rule having been obtained accordingly,

James, Q.C., and *Baylis*, shewed cause. The surrounding circumstances may be taken into account to assist the construction of the instrument: *Carr v. Montefiore* (1); and among those circumstances is the fact, that the plaintiffs had previously supplied the defendant's son on credit, and after the giving of the guarantee, and in consequence of it, continued so to supply him. This shews that the future supply was intended to be secured, and the natural construction of the words is to the same effect. *Hoad v. Grace* (2) shews that the words "coals supplied" may properly refer to the future. The words "any accounts due," also naturally express a current account, including the future as well as the past. If the plaintiff's construction were not adopted, it would be necessary to say either that the consideration was past, and the guarantee therefore void, which is a conclusion to be escaped, if possible, or else that the guarantee was given for the forbearance of a debt already due, which the words do not at all express. They also cited *Kennaway v. Treleavan*. (3)

Holker, in support of the rule. A guarantee must be interpreted strictly, and the guarantor's liability not extended by inference: per *Bayley, B.*, *Nicholson v. Paget*. (4) If circumstances are to be used to aid the construction, they favour the defendant's contention; for

(1) 5 B. & S. 408; 33 L. J. (Q.B.) 256.

(3) 5 M. & W. 498.

(2) 7 H. & N. 494; 31 L. J. (Ex.) 98.

(4) 1 Cr. & M. at p. 52.

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the payment, the bill, and the guarantee nearly make up the amount of the existing debt. But the words are in their true construction inconsistent with the plaintiffs' construction, for even admitting that the consideration is the future supply of coals on credit, it does not follow that it is this supply that is guaranteed; the words "any accounts due" naturally mean *now* due, and "may be owing" means may be *now* owing; it is consistent with the defendant's ignorance of the state of the accounts between his son and the plaintiffs, that he should use indefinite terms in describing them. *Allnutt v. Ashenden* (1) is a strong authority in the defendant's favour.

KELLY, C.B. I think this is clearly a continuing guarantee. The question in these cases depends not merely on the words; but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction. It is, therefore, necessary to look at the existing state of things, and looking to that, to construe the words in such a way as we consider most consistent with the intention of the parties; not, indeed, considering any statement of either party as to what he meant by the words used, but taking the words themselves, together with the surrounding facts, as the exponents of the meaning of both. The first fact is, that on the 10th of June, 1861, when the guarantee was given, the defendant's son already owed to the plaintiffs a debt of more than 100*l.* for goods supplied. The guarantee is expressed to be "in consideration of the credit given by Messrs. The Hindley Green Coal Company to my son, J. P., for coal supplied by them to him." Now, we are not to assume that the consideration intended was the credit previously given, which, as being a past consideration, would make the guarantee bad. And if the real consideration were the forbearance to sue for the debt which had become due upon that credit, one would expect to find words plainly expressing (if, indeed, such a document as this were used at all), that whereas credit had been already given, and a debt incurred for coal supplied, the defendant undertook to guarantee the amount so due in consideration of a forbearance to sue, upon ascertained terms, and for a definite period. The presumption,

then, is against the inference that the guarantee extended only to the existing debt. But there is the further fact, that after this guarantee was given, the supply of coals, which had been previously suspended, was continued; from which we may assume that it was intended by the parties that it should continue; and as the coals had before been supplied on credit, resulting in the then existing debt, we may also assume that it was contemplated by the parties that there should be a continuing credit, resulting in a fresh debt; that this continuing credit, therefore, was the consideration, and the debt resulting from it included in the guarantee. The same conclusion follows from the words in which the defendant states the obligation which he incurs, as to which statement I may observe that if the intention were only to guarantee the existing debt, it is difficult to see why a lengthy instrument like this should be adopted, when a promissory note, drawn in specific terms, would have answered all the purpose. The form, then, of the guarantee is this: "I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of *any accounts due*, I bind myself by this note to pay to the Hindley Green Coal Company whatever *may be owing* to an amount not exceeding the sum of 100*l.*" Now, as it appears that the sum of 100*l.* was made up of various smaller sums, too much stress must not be laid on the words "any accounts due." But do the words "whatever may be owing" refer to an account already due, or to a sum which will be due whenever the guarantee shall be put in force? They seem not suitable to a specific and ascertained sum already due, but have a direct and proper application to what might afterwards become due. The whole may be properly read "in consideration of your continuing to supply coals on credit to my son, I guarantee the payment of any sum which may become due from him to you on the coal account." Construing this instrument, then, both by the words and the circumstances, I come to the conclusion that it is a continuing guarantee, and that the plaintiffs are therefore entitled to recover, and the defendant's rule must be discharged.

MARTIN, B. I do not mean to dissent from the judgment of the Chief Baron; but the case is not to my mind a clear one.

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With respect to the facts they are these: the defendant's son had dealt with the plaintiffs, and incurred a debt of 170*l.*; they asked for payment, and on his treating their demand with rudeness, refused to continue to supply him unless he procured a guarantee. On the 10th of June 9*l.* was paid by the son, and a bill of exchange given for 61*l.*; there thus remained 100*l.* unsecured, and the guarantee in question was written out by one of the plaintiffs, and sent by the son to his father, the defendant, to sign. He signed it, and there is really no evidence that he knew anything more of the son's transactions with the plaintiffs. If the circumstance of the existing debt be taken into consideration, there is much force in the argument that the instrument should be read as limited to the 100*l.* then due; and if the defendant is to be held liable, I think it must be on the words of the guarantee itself. These are consistent with the defendant's view, but it is not clear that they may not be read as contended for by the plaintiffs. I cannot assent to the opinion expressed by Bayley, B., in *Nicholson v. Paget* (1), that a contract of guarantee ought to be read in any peculiar way. I think it should be read in the same way as any other contract, and as I cannot say that this guarantee will not bear the interpretation given to it by my Lord and my learned Brothers, I concur in their judgment.

BRAMWELL, B. It is difficult to say that any of these cases are clear, for they always result from the insufficiency of the expressions used; but I think that this ought to be read as a continuing guarantee. We not only may, but must, in the case of every contract, have evidence who are the parties to it, and what are the circumstances to which it relates. If the best known man in England were letting to the next best known man the best known property, it would still be necessary to prove who the parties were, and what they were dealing with. Now here the son was in debt to the plaintiffs on an account for coals supplied, and a further dealing on credit was contemplated. The guarantee is expressed to be in consideration of credit given; if this referred to past credit, it would refer also to a past consideration, and the contract, stating a *bad* consideration, would

not be helped by the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 3). There is a presumption against the defendant giving an invalid document, or the plaintiffs receiving it, and the words do not require such a construction. It is then contended, that the consideration is, the forbearance to sue for the existing debt. But, as the Chief Baron has observed, the expression would in that case not be accurate; if this were meant, it would be expressed that time was to be given by the plaintiffs, and probably some time would be named. I bow to the authority of the case of *Allnutt v. Ashenden* (1), but I do not understand it; and I cannot adopt the dictum contained in *Nicholson v. Paget*. (2) Interpreting this instrument in the same way as other contracts, I think it refers to credit for goods to be supplied. It is said that this would not be a usual expression, and that the words must be altered to make them bear that meaning. But I think not: if you proposed to deal with a coal merchant, and were to say to him, "Is there any credit given here?" he would say, "Yes; we give (suppose) a fortnightly credit for coals supplied." The expression of giving credit is proper to supplying goods without payment, not to the forbearance to sue for a debt already incurred for goods so supplied. Further, the defendant binds himself to pay "in default of his son's payment;" these words naturally refer, not to any account now due, because on that account default had already been made, but to a fresh account which the son might fail to pay when it became due. If the contrary were intended, the proper expression would be, "I bind myself to pay the sum now due." On these grounds I am of opinion that this is a continuing guarantee. I am not quite sure whether we should be justified in applying the consideration I am about to mention to the interpretation of the intention of the parties, but I may observe that to confine a guarantee to a past transaction is a very idle thing, for the whole matter is reduced to a question of book-keeping. The creditor, who had the old debt secured, would insist upon the payment of the new and unsecured debt, rather than the old one, and would appropriate to that debt any payments he received from the debtor. But whether the defendant did or did not mean to make himself liable on a continu-

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(1) 5 M. & G. 392.

(2) 3 Cr. & M. at p. 52.

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ing guarantee, that is the construction which we must give to the written contract.

PIGOTT, B. I have not been free from doubt, but I have arrived at the same conclusion as the rest of the Court. I should have thought more of the fact of the guarantee being for the amount of the debt, after deducting the sum paid and the bill of exchange, if it had been an odd sum, instead of the round sum of 100*l.*, which is not so naturally identified with a specific existing debt. Looking at the words and the circumstances, I agree that this instrument is a continuing guarantee, and that the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Gregory & Co., for W. L. Welsh, Manchester.*

Attorneys for defendant: *Edwards, Layton, & Jaques, for J. Eltoft, Manchester.*

Nov. 20.

BOS AND ANOTHER v. HELSHAM AND ANOTHER.

Vendor and Purchaser—Conditions of Sale—Condition for Compensation for Mistake in Particulars—Mistake discovered after Conveyance—Arbitration—Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 11, 13.

At a sale by auction of premises belonging to the defendants, stated in the particulars of sale as being then let at a rental of 30*l.* per annum, one of the conditions was that, if any mistake was made in the description of any of the properties offered for sale, or if any error whatever appeared in the particulars of sale, such mistake or error should not annul the sale, but a compensation in such case should be given, to be settled by two referees, one to be appointed by either party to the sale, or an umpire. The plaintiffs purchased of the defendants the premises subject to this condition. After the conveyance had been executed, an error in the rental stated in the particulars was discovered:—

Held, that the error was a proper subject of compensation within the meaning of the condition, although not discovered until after the execution of the conveyance.

The defendants having failed to appoint a referee for seven clear days after the plaintiffs had appointed one, and after a notice in writing requiring them to make the appointment, the plaintiffs, acting under the provisions of the Common Law Procedure Act, 1854, s. 13, appointed their referee to act as sole arbitrator, and a

sum of money was awarded by him to them by way of compensation for the error :—

Held, following *Collins v. Collins* (26 Beav. 306; 28 L. J. (Ch.) 184), that the reference indicated in the condition being one of the quantum of compensation only, was not a reference to arbitration of an existing or future difference within the meaning of the Common Law Procedure Act, 1854, s. 11; and that the plaintiffs had, therefore, no power under s. 13 of that act, to appoint their referee as sole arbitrator.

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DECLARATION that the defendants put up for sale by public auction certain properties described in certain particulars of sale, and amongst others a property described by the defendants in the particulars as two freehold dwelling-houses and shops, one of which was let “to Mr. Beard at 30*l.* per annum.” That amongst the conditions of sale was the following condition : “The several properties are believed, and shall be taken, to be correctly described as to quantities and otherwise, and are sold subject to all chief and other rents, rights of way and water, and other easements if any charged or subsisting thereon. If any mistake be made in the description of any of the properties, or if any error whatever shall appear in the particulars of sale, such mistake or error shall not annul the sale of the lot to which such mistake or error may relate; but in such case a reasonable compensation or equivalent shall be given or taken, as the case may require either way, such compensation or equivalent to be settled by two referees, one to be appointed by either party, or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final.” That at the auction the plaintiffs were the purchasers of the said property, upon and subject to the above condition, at the price of 690*l.*, and thereupon the plaintiffs and the defendants agreed that the defendants should sell to the plaintiffs, and that the plaintiffs should buy of the defendants the property so described, at the said price, subject to the said condition. Averment, that a mistake was made in the description of the said property, and that an error in the description of the said property appeared in the particulars of sale to the prejudice of the plaintiffs, to wit, that the property was described in the particulars as of a higher annual rent and a greater annual value than the same then really was, and it was not stated in the particulars, as the fact was, that all the rates and taxes of the houses were, by agreement with the tenant, paid by

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the landlord; that thereupon the plaintiffs became entitled to be paid or allowed by the defendants a reasonable compensation or equivalent in respect of the said mistake or error, to be settled in the manner prescribed by the conditions; that thereupon the plaintiffs appointed a referee to settle such compensation or equivalent according to the condition, and did all things necessary, &c., to entitle the plaintiffs to have the defendants appoint a referee on their part. First breach, that the defendants did not nor would appoint any such referee, but neglected and refused to do so. Second breach, that the defendants failed to appoint an arbitrator or referee according to the condition, or at all, for seven clear days after the plaintiffs had appointed an arbitrator, and had served the defendants with notice in writing to make the appointment of an arbitrator on their part; that the plaintiffs did all things necessary on their part, &c., to entitle them to appoint the said arbitrator, to act as sole arbitrator in the reference, and did thereupon appoint him to act as sole arbitrator; that the said arbitrator duly took upon himself the reference, and duly made his award in writing, and pursuant to the condition awarded that the amount payable in respect of such reasonable equivalent and compensation for the said mistake and error to be paid by the defendants to the plaintiffs was 113*l.*, of all which the defendants had due notice; that the plaintiffs did all things, &c., necessary on their part to entitle them to be paid the said sum by the defendants, yet the defendants did not pay the same.

Plea on equitable grounds, setting out all the conditions of sale [the third of which stated that the defendants were selling as trustees and executors under the will of one Percy Sadler; the fourth of which enabled the purchaser within a specified time to make requisitions and objections to the title; and the ninth of which was that set out in the declaration], and averring that the defendants agreed to sell the property therein mentioned to the plaintiffs upon the terms stated; that the defendants had no beneficial interest in the property, but were trustees and executors only; that the plaintiffs, acting under the fourth condition, investigated the title and approved of it; that afterwards the defendants by their deed, in consideration of the sum of 690*l.*, conveyed the hereditaments so agreed to be sold to the plaintiffs in fee, and the

plaintiffs accepted the conveyance and paid the purchase-money, and the purchase was then finally completed; that the plaintiffs had, from the time of the execution of the conveyance, been in receipt of the rents and profits; that after the completion of the sale by execution of the conveyance and payment of the purchase-money, and after the lapse of a reasonable time from the completion of the purchase, the plaintiffs discovered and gave notice to the defendants of the alleged error and mistake in the particulars of sale, and until then the defendants had no notice of it; and that the referee was not appointed until afterwards.

Demurrer and joinder.

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J. Brown, Q.C. (*Lopes* with him), for the plaintiffs in support of the demurrer. First, the liability of the defendants is not affected by their being sued in their fiduciary character. At law they are liable for a breach of their agreement, whether they have or have not a beneficial interest. [This point was conceded on the part of the defendants.] Secondly, as to the first breach, the plea affords no answer. The terms of the ninth condition of sale are perfectly general. They are not limited to errors or mistakes discovered *before* the completion of the sale by the execution of the conveyance, and that being so the plaintiffs are entitled to compensation at whatever time the error or mistake in the particulars of sale is discovered: *Cann v. Cann* (1); *Thomas v. Powell*. (2) Thirdly, as to the second breach, the plaintiffs are entitled to recover the amount awarded by the sole arbitrator appointed by them. The reference indicated in the ninth condition is an arbitration within the meaning of the Common Law Procedure Act, 1854, s. 11, which applies to future as well as to existing differences. The plaintiffs were therefore justified in appointing, under s. 13, an arbitrator to act alone and assess the amount of compensation due to them.

Henry Matthews, contra. First, as to the first breach; although the language of the condition is general, the purchaser cannot recover for errors in the particulars of sale, unless he discovers them before the completion of the sale by execution of the conveyance: *Okill v. Whittaker*. (3) In *Dart's Vendors and Purchasers*, 3rd ed. p. 503, it is said that with "some few special exceptions,

(1) 3 Sim. 447. (2) 2 Cox Chanc. Cas. 394. (3) 2 Phill. 338.

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a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of any defects either in the title to or quantity or quality of the estate"; and the same doctrine is laid down in Lord St. Leonards' Vendors and Purchasers, 13th ed. pp. 232, 233, where the writer remarks that a conveyance executed will not easily be set aside without fraud, or without some unconscionable circumstance being proved whence fraud might be implied. In the same work it is also stated (p. 197) that after contract executed, "a bill cannot be filed simply for compensation, *e.g.*, where the rental of the estate was represented higher than its actual amount": *Newham v. May*. (1) The "special exceptions" above referred to are cases where there is fraud express or implied on the part of the vendor, or where the estate is sold compulsorily under a decree of the Court, as was the case both in *Cann v. Cann* (2) and *Thomas v. Powell*. (3)

[KELLY, C.B. It is admitted that there are "special exceptions" to the general rule. Is not this one of them? Have not the parties expressly contracted that compensation shall be given *whenever* the error is discovered? Moreover, the knowledge that the condition is perfectly general in its terms, and unlimited as to time, might well throw a purchaser off his guard during the progress of completing the sale.]

The same observation would apply to a case where, as invariably happens, there is an express covenant for title; yet it is clear that no objection to the title can be taken after conveyance executed. Again, the construction contended for is reasonable, and confines the liability of the vendors, who are trustees, within moderate limits. It is warranted, too, by the language of the condition, which only applies to errors whose existence would have annulled the sale: *Leslie v. Thomson*. (4) This error would not have done so, for there is no *warranty* that the rent shall be exactly as stated. Secondly, as to the second breach. This is not an "arbitration" within the meaning of the Common Law Procedure Act, 1854, s. 11. In *Collins v. Collins* (5) it was held that a reference of the price simply of certain property to arbitrators does not constitute an arbitration within that act. But under this ninth

(1) 10 Price, 117. (2) 3 Sim. 447. (3) 2 Cox Chanc. Cas. 394.

(4) 9 Hare, at p. 273. (5) 26 Beav. 306; 28 L. J. (Ch.) 184.

condition of sale, nothing but the *quantum* of compensation can be assessed. The case is one of valuation only. The condition assumes that the parties are agreed as to there being some error or other, and only empowers the referees to inquire how much is to be given or taken in respect of it. The plaintiffs, therefore, had no right to avail themselves of the provisions of the Common Law Procedure Act, 1854, s. 13, and the award of damages by their sole arbitrator is of no effect against the defendants: *Russell on Arbitration*, 4th ed. p. 32; *Leeds v. Burrows* (1); *Lee v. Hemingway*. (2)

J. Brown, Q.C., in reply.

KELLY, C.B. I am of opinion that, as to the first breach in the first count of the declaration, the plaintiffs are entitled to our judgment. It is unnecessary to enter into the nice distinctions which exist between warranties and false representations. I acquiesce in the general doctrine laid down on the subject in *Sugden's Vendors and Purchasers*, and in the difference which the author points out between objections entitling a purchaser to annul a contract before completion of the conveyance, and those which may be raised after completion, where a court of equity will not interfere, and there is no remedy at law, even though the objections are well-founded, because they have not been taken in proper time. But in this case, as if with a view of avoiding these distinctions and differences, the parties themselves have expressly contracted that if any mistake be made in the description of the property, or any error occurs in the particulars of sale, such mistake or error shall not annul the sale, but a reasonable compensation, to be assessed in a specific manner, is to be given. Now, here it is to be observed that no distinction is made, though it would have been easy to make it, between an error or mistake discovered *before*, and one discovered *after*, the execution of the conveyance. Such a distinction is sought on the part of the defendants to be imported into the contract, although the contract itself is silent. I do not think it necessary so to import it, for this reason, if for no other, that here in order to avoid any inquiry involving delay into the value of the property or its rental, there is an express condition in the terms I

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(1) 12 East, 1.

(2) 15 Q. B. 305 (note).

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have referred to, the operation of which is wholly unlimited in point of time or in any other respect. Any other construction would subject the purchaser to considerable disadvantage. For if he had supposed or been aware that, should there be any error or mistake, he must object on that account before the execution of the conveyance, or else not at all, he would of course make prudent and searching inquiries previously to completion. But where the contract contains a condition like this, he would naturally be somewhat thrown off his guard in the interval of time between the commencement and completion of the contract. He would feel himself bound to complete, whether there were any objection or not on the score of misdescription, and whether it were well or ill founded. Then is he to be told afterwards, that in spite of the condition, his opportunity to object is gone? Surely he has a right to reply: "My contract provides otherwise; I make my claim now, and I make it under the express terms of my agreement with the vendor." There may, indeed, be many reasons for the introduction of such a term as this, giving compensation for errors or mistakes; and it would be hard and inequitable to say that a mistake which the purchaser probably had neither means nor opportunity of discovering previous to the conveyance of the property, and his entering into the enjoyment of it, could not be remedied. The term seems to me to be inserted by way of safeguard, and I am of opinion that the plaintiff is entitled to sue for compensation. The case is, in my judgment, one of those "special exceptions" to the general rule mentioned by the learned text writer who has been referred to.

With regard to the objection to the second breach, I may observe that I think it matter for regret that any subtle distinctions should prevail in cases concerning the arbitration clauses of the Common Law Procedure Act, 1854. In general it is highly desirable that where an arbitration of any sort has been agreed on between parties, these clauses should be held to apply. But we are bound to look to authority, and I cannot distinguish the present case from that of *Collins v. Collins* (1), either in substance or principle. The principle as there laid down amounts to this—

(1) 26 Beav. 306; 28 L. J. (Ch.) 184.

that, to make an arbitration within the act, there must be an actual difference between the parties; and where the contract assumes and provides for no difference, and where probably there is no difference in fact, then, according to that authority, the case is not one of arbitration. "An arbitration," says the Master of the Rolls, in that case (1), "is a reference to the decision of two or more persons, either with or without an umpire, of a particular matter in difference between the parties; and although it is very true that in one sense it must be implied, either that there is a difference, or that a difference may arise, between the parties, yet the distinction is material, and one which has been properly relied on." And further on he adds: "If two persons enter into an agreement for the sale of property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, say we will refer the question of price to A. B., he shall settle it, and they agree that the matter shall be referred to his arbitration, that would appear to be 'arbitration' in the proper sense of the term within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to be arbitration." Now, applying this language to the case before us, there is nothing in this condition of sale to imply or point to a difference arising between the parties. It simply provides that in case of error or mistake, a reasonable compensation to be assessed by referees is to be made; and it points to no difference existing or likely to exist, so as to give the subsequent proceedings the character of an arbitration. If, then, we tried to distinguish this case from *Collins v. Collins* (2), we should, I think, be introducing those subtle distinctions between case and case which are so much to be deprecated. The plaintiffs, therefore, are entitled to our judgment on the first breach, and the defendants on the second.

CHANNELL, B. I am of the same opinion. The case comes before us on a demurrer to a plea, which is pleaded to both the breaches in the declaration. It is therefore necessary to consider each breach singly. Now there are many points which have been touched on during the argument which it is unnecessary to decide.

(1) 28 L. J. (Ch.) at p. 186.

(2) 26 Beav. 306; 28 L. J. (Ch.) 184.

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We need not decide, for instance, what would have been the parties' rights had there been no ninth condition of sale,—whether or not such a mistake as has occurred would or would not have annulled the sale. Here there is an express condition that it shall not annul it. Nor need we examine the authorities which are supposed to decide that the parties' rights are concluded after conveyance executed, purchase-money paid, and possession given, except where there has been fraud or circumstances (such as gross inadequacy of price) whence a court of equity would imply fraud. For we are not called upon to *rescind* this contract. The contract stands, possession has been taken, the conveyance executed, the price paid; and the only question on the first breach is, whether there is or is not a right to sue for compensation for an error in the particulars of sale, discovered after the completion of the conveyance. I am of opinion that there is such a right. It is contended that the execution of the conveyance concluded the parties, but we are dealing with an express contract between them, from which the right to sue springs. Why should we limit it? Why should we say that because the purchaser did not discover the error until after completion he cannot sue for compensation? It seems to me that such a decision would be making a new contract between the parties different from that which they have made themselves. Seeing, then, that the contract of sale can well stand, and yet that this claim, which is founded on an independent condition, can be enforced, I am of opinion that on the first breach the plaintiffs are entitled to our judgment.

With regard to the second breach, the same point arises as upon the first. But then the plaintiffs seek to recover not merely damages, but a specific sum. The breach is framed on the principle that the plaintiffs can recover the sum awarded as compensation by their referee acting alone. It is contended that we must read the ninth condition in connection with section 13 of the Common Law Procedure Act, 1854, and that, so reading it, the amount due has been ascertained properly and with sufficient accuracy. I should have had some doubt on the subject independently of the case of *Collins v. Collins* (1), but having regard to that decision, I feel bound to hold that the amount of compen-

(1) 26 Beav. 306; 28 L. J. (Ch.) 184.

sation has not been ascertained so as to enable the plaintiffs to recover. On this breach, therefore, I am of the same opinion as my Lord Chief Baron, that our judgment should be for the defendants.

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FIGOTT, B. I am of the same opinion on both points. As to the first breach, I ground my judgment on the construction to be placed on the special contract between the parties. An error having been discovered in the particulars of sale after the execution of the conveyance, the question is, whether the purchaser may fall back on the terms of the condition, and allege that he is still entitled to compensation. I am of opinion that he may do so. No time is fixed by way of limitation within which compensation may be recovered. That being so, the case seems to me one of the special exceptions to the general rule laid down in *Mr. Dart's Vendors and Purchasers*.

As to the second breach, I do not think this a matter of arbitration within the meaning of the arbitration clauses in the Common Law Procedure Act, 1854. There is no matter in difference between these parties. This appears clear by noticing what it is which is meant to be referred, namely, the amount of compensation if there was any error. The language of the condition assumes that the parties are in agreement as to there being an error, and the only question remaining would be one of amount. Following the decision in *Collins v. Collins* (1), therefore, in which I concur, my judgment on this point is for the defendants.

*Judgment for the plaintiffs on the demurrer to the plea,
so far as regards the first breach in the first count:
and for the defendants on the demurrer to the plea so
far as regards the second breach.*

Attorneys for plaintiffs: *E. J. Sydney & Sons.*

Attorney for defendants: *Robert Helsham.*

(1) 26 Beav. 306; 28 L. J. (Ch.) 184.

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXX VICTORIA

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Jan. 11.

JOHNSTON AND OTHERS *v.* KERSHAW.

Principal and Agent—Foreign Market—Exigencies of Market—Order to purchase, Substantial Compliance with—Money paid.

The defendant, who resided at Liverpool, gave to the plaintiffs, who carried on business at Pernambuco, an order to purchase 100 bales of cotton of a specified quality, in the following terms: "I beg to confirm my letter of the 23rd of February, and hope you will have executed fully all the cotton ordered, and consider still in force. If executed, please regard this as a new order for 100 more." The plaintiffs, acting on this order, purchased in the market, and paid for, ninety four bales of the specified cotton. No direct evidence was given as to the then state of the Pernambuco market; but the circumstances of the case rendered it reasonable to infer that the plaintiffs, in purchasing ninety four bales, had done all that was practicable. The defendant declined to pay for these bales on the ground that his order had been inadequately performed:—

Held, that the order must be construed with reference to the state of market for which it had been given, and that it had been substantially complied with.

DECLARATION for money payable for goods bargained and sold, work done and commission due in respect thereof, for money paid, and for money found to be due on accounts stated.

Plea, never indebted. Issue thereon.

The cause was tried before Martin, B., at the Liverpool summer assizes, 1866, when the following facts were proved :—

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The plaintiffs are merchants at Pernambuco, and the defendant is engaged in business at Liverpool. On the 8th of March, 1866, the defendant, who had on previous occasions bought cotton from the plaintiffs, wrote them the following letter :—"I beg to confirm my letter of 23rd February, and hope you will have executed fully all the cotton ordered, and consider still in force. If executed, please regard this as a new order for 100 more, at extreme limit $17\frac{1}{2}d.$ for Pernam or Paraiba Firsts, and 100 Bahia at $17\frac{3}{8}d.$ good, fair, and in each case the same quantity additional for each halfpenny down in price. Maceios are not desirable, unless at $2\frac{1}{2}d.$ or $3d.$ below, say about $15d.$ I shall be greatly disappointed if I get no cotton at these prudent limits. I congratulate myself on reducing on 8th January to $17\frac{1}{2}d.$, avoiding losses." On the 17th of March, the defendant sent a telegram (which was afterwards confirmed by letter) repeating the order, and altering the maximum limit for Pernam and Paraiba cotton to $19d.$ per lb.

In conformity with this order, the plaintiffs bought, in the market at Pernambuco, on the defendant's account, 100 bales of Paraiba cotton, ninety four being Paraiba firsts, and six being Paraiba seconds. On the 12th of April, they gave notice by letter to the defendant of this purchase, and of the shipment of the goods. In the letter they stated that six of the bales were "seconds," and requested the defendant, if he did not want them, to hand them over to Messrs. Samuel Johnston & Co., of Liverpool [the plaintiffs' Liverpool house], who would pay the invoice cost. Meanwhile, there having been a heavy fall of prices in the Liverpool market, the defendant had written on the 7th of April to the plaintiffs, reducing his limits $3d.$ per lb., and also directing them, if any cotton above $17\frac{1}{2}d.$ had been bought on his account, to resell the same upon the spot, at least possible loss, and to cancel all his orders to that date for cotton and sugar. The letter continued thus :—"I will write by next mail, when I hope to be able to fix a maximum price for cotton. In the meantime, I hope and trust you have not effected any purchase on account of yours, &c." On the 23rd of April, the defendant again wrote to the plaintiffs, reiterating the

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instructions contained in the letter of the 7th, and fixing, in the event of a panic in the market, a fresh maximum for 100 bales of Paraiba firsts. The plaintiffs, on the 28th of April, in acknowledging the receipt of the letter of the 7th, stated, with reference to the defendant's request to sell any cotton they might have bought on his account on the spot, that they were unable to comply with his instructions in that respect, as the only order they held for him was for the 100 bales already shipped.

The plaintiffs drew a bill on the defendant for the price of these 100 bales, which was presented at maturity to him for payment. He refused, however, to pay it. The plaintiffs thereupon brought this action. No direct evidence was given of the state of the market at Pernambuco, nor as to whether it would have been possible for the plaintiffs to have bought the whole 100 bales of "firsts" at the time they bought the ninety four.

Under these circumstances, a verdict was entered for the plaintiffs for the price of the 100 bales, the value of the six bales being taken according to the proportion in the invoice that had been sent with the goods. Leave was reserved to move to enter a verdict for the defendant, on the ground that, on the facts proved, the plaintiffs were not entitled to recover, and that there was no evidence to go to the jury in support of any of the counts of the declaration: or to reduce the damages by the value of the six bales of "seconds."

A rule having been obtained accordingly,

Quain, Q.C., and *Benjamin*, shewed cause. (1) The defendant is bound to pay for as many bales of the proper quality as were bought on his account. The transaction is one of agency, and therefore not governed by the same rules as a transaction between vendor and vendee. The principles governing the case are those laid down in *Story on Agency*, s. 170: "The principal is not bound by the unauthorized acts of his agent, but is bound where the authority is substantially pursued, or so far as it is distinctly pursued. But the question may often arise whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy one hundred bales

(1) The liability of the defendants to take the six bales was not insisted on.

of cotton for him, and he should buy fifty at one time of one person, and fifty at another time of a different person; or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question might arise whether the authority was well executed. In general it may be answered that it was; because in such a case it would ordinarily be implied, that the purchase might be made at different times, of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed." Here there is no direct evidence that the plaintiffs had done all they could in buying ninety four bales, but there are materials enough to shew that they were unable to do more. In *Ireland v. Livingston* (1) the defendant was held liable under almost exactly similar circumstances to the present. There has been a *substantial* compliance with the terms of the order; and even granting it was not strictly executed, the defendant's subsequent conduct as shewn by the correspondence amounts to a ratification. With regard to the form of the declaration, the count for money paid at all events will certainly lie.

Jones, Q.C., in support of the rule. The order is on the face of it for 100 bales, neither more nor less; and in order to entitle the plaintiffs to maintain that it means "*up to 100*," they should have given evidence as to the usage of the market at Pernambuco, as was done in *Ireland v. Livingston*. (1) As the case stands there is nothing to shew that a purchase of anything but the exact number of 100 bales was contemplated by the defendant, or would be considered a performance of the order. The transaction ought not to be treated as one of agency entirely, but as of sale; and regarding it in that view it could scarcely be contended that the vendee would be bound to take a part only of the goods ordered by him.

KELLY, C.B. I am of opinion that the plaintiffs are entitled to our judgment. The question for our consideration turns entirely upon the meaning to be placed upon an order from the defendant to the plaintiffs, contained in a letter dated the 8th of March, 1866, in these terms:—"I beg to confirm my letter of 23rd of

(1) Law Rep. 2 Q. B. 99.

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February, and hope you will have *executed fully* all the cotton ordered, and consider still in force. If executed, please regard this as an order for 100 more." Then follows a description of the sort of cotton required, and limitations as to price. Now the question is, whether this letter necessarily means an order to purchase 100 bales of cotton *at once*, in one and the same purchase, or whether it may not mean an order to buy these 100 bales in such manner, and at such times, as the agent might find practicable, having regard to the state of the market. I regret that there is no direct evidence before us of what the state of the market was at Pernambuco, as was the case in *Ireland v. Livingston*. (1) There is, however, in my judgment, enough in this case apparent, from the defendant's language and conduct, to enable us to collect that the state of the market was not such as to admit of the whole 100 bales being purchased at one and the same time. I consider that we have materials for inferring that the mode of executing the order contemplated by the parties was, that the agents at Pernambuco should go into the market and buy the bales ordered, in such minor quantities as they might find convenient or practicable. If they could at one time have obtained all the 100 bales, it would have been their duty to have done so. But we may fairly conclude from their conduct that they could not. They actually bought ninety four. Surely they would, if they could, have bought the remaining six. Not being able to buy them, were they to leave the order altogether unexecuted? Rather it was their duty, and was, I think, contemplated by the defendant, that they should buy as many bales as they could get, and make up the total number as soon as practicable.

The view I take of the meaning of the order is confirmed by the reference to the order of the 23rd of February contained in the letter of the 8th of March. That order was, it appears (2), also for 100 bales of cotton, and the defendant in his letter expresses a hope that it had been "fully executed." Here, then, is a direction by the defendant to his agent at Pernambuco to buy "100 bales

(1) Law Rep. 2 Q. B. 99.

(2) The order had not been put in evidence at the trial, but it was stated

to the Court, during the argument, and admitted on both sides, to have been an order for 100 bales.

more," if the agent had "fully executed" the previous order, *i.e.* they had already bought 100. That implies a notion on the part of the defendant that very likely his agents had not "fully executed" the previous order, *i.e.* had only bought as many of the 100 as they could get. I think, therefore, that, although we have no *direct* evidence on the point, there is sufficient evidence to shew that the state of the market at Pernambuco was such as to render it impossible for the plaintiffs to purchase the 100 bales all at once, and that the parties to the transaction must have understood that the purchase was to be made, if necessary, in several minor quantities. The whole question, it is true, turns on the meaning of the order, but that must be taken with reference to the state of the market for which it was given.

Under these circumstances, I think that this rule should be discharged. I may add that it is very satisfactory to find that our judgment is in accordance with the proposition cited during the argument from Justice Story's work on Agency. (1)

MARTIN, B., concurred.

CHANNELL, B. I am of the same opinion, but I desire to add one or two remarks on some of the points raised in this case. With regard to the declaration, it is unnecessary to decide whether the count for goods bargained and sold would lie. It is enough that there is a count for money paid. With regard to the main question, I also regret that we have no evidence of the usage of the market at Pernambuco before us. But because we have no such evidence in a specific shape, it by no means follows that we have not materials enough to enable us to judge what the usage of the market is. The language of the order of the 8th of March, and the letter of the 7th of April directing a sale "upon the spot," in my opinion shew the plaintiffs' interpretation to be right. I may add that the observation of Justice Story (1), which has been referred to, seems to me replete with common sense, and I make it the basis of my judgment. I am, therefore, of opinion that this order must not be taken as an order to buy 100 specific bales of cotton at one time, but that the plaintiffs by purchasing

(1) s. 170.

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ninety-four bales have executed it with due and reasonable diligence. The rule must, therefore, be discharged.

PIGOTT, B., concurred.

Rule discharged.

Attorneys for plaintiffs: *Chester & Urquhart, for Lace, Banner, & Co., Liverpool.*

Attorney for defendant: *W. Pitman, for John Holden, Liverpool.*

Jan. 16.

COOPER, APPELLANT v. WOOLLEY, RESPONDENT.

Construction—Smoke—Town's Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108.

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108, imposes a penalty on persons so negligently using a furnace as not to "consume the smoke" arising from it.

The Birmingham Improvement Act, 1851 (14 & 15 Vict. c. xciii.), s. 55, incorporates the above section, but provides that the words "consume the smoke" shall not be in all cases read as "consume *all* the smoke;" and that the penalty may be remitted if the person summoned under that section has so constructed or altered his furnace as to consume *as far as possible* its smoke, "and has carefully attended to the same, and consumed *as far as possible*" its smoke.

On an information against the appellant for so negligently using his furnace as not to consume its smoke, it was not shewn that the furnace was improperly constructed; it was found that it was capable of consuming more smoke than it in fact did; but that to use the means provided for that purpose would render it impossible to carry on the appellant's trade with that furnace. The appellant was convicted:—

Held (assuming the furnace to be properly constructed), that "as far as possible" meant as far as possible consistently with carrying on the trade in which the furnace was employed; and that the appellant was wrongly convicted.

CASE stated under 20 & 21 Vict. c. 43, by the police magistrate of Birmingham, on convicting the appellant, under the Towns Improvement Clauses Act, 1847, s. 108, for so negligently using his furnace as not to consume its smoke.

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108, provides that, in places to which the act applies, all furnaces made after the passing of the special act shall be so constructed as to consume their own smoke, and all existing furnaces shall, within

two years after the passing of the special act, be altered so as to consume their own smoke ; and that if after such period any person shall use a furnace not so constructed, or if, after the passing of the special act, any person shall use a furnace constructed since the special act, and not so constructed, or shall “ so negligently use any such furnace as not to consume the smoke ” thereof, such person shall be liable to a penalty of 40s.

The Birmingham Improvement Act, 1851 (14 & 15 Vict. c. xciii.), s. 55, incorporates the above section, but provides that the words “ consume the smoke,” shall not be held in all cases to mean “ consume all the smoke,” and that the penalties may be remitted by the justice or justices, if he or they shall be of opinion that the person summoned has “ so constructed or altered his furnace as to consume *as far as possible* all the smoke ” thereof, “ and has carefully attended to the same, and consumed *as far as possible* the smoke ” arising from it.

The appellant’s furnace (which was of the kind called a muffle) was used for annealing bars of copper and brass, which were intended to be converted into wire. It was so constructed as to consume its smoke, and it was proved that the quantity of smoke emitted by it might be materially reduced by the regular admission of the external air, either by partially keeping open the door of the fireplace, or by a ventilator, actually attached to the under surface of the furnace, but not used. On the other hand, evidence was given, and the magistrate found as a fact, that if the external air were so admitted, the temperature of the interior of the furnace would not be uniform, and that the process of properly annealing the metal for the purpose of making wire would be rendered impossible in the furnace used by the appellant. It was contended that the meaning of the words “ as far as possible ” in the Birmingham Improvement Act, 1851, s. 55, meant “ as far as possible consistently with the due carrying on of the trade ; ” but the magistrate did not adopt that construction, and convicted the appellant.

Mellish, Q.C. (*Beresford* with him), for the appellant, contended that the qualification of the special act would have no effect unless it were so construed : and that to treat the appellant’s use as negli-

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gent, when any other mode of using the furnace would make his trade impossible, would be to prohibit the exercise of the trade entirely.

Keane, Q.C. (Dugdale with him), for the respondent, contended that the words must be interpreted strictly; that the statements in the case only amounted to saying that the trade could not be so profitably carried on otherwise, and that this circumstance was of no importance compared with the sanitary objects aimed at by the acts; and that even if the trade were rendered impossible by upholding this conviction, the opposite conclusion would only be arrived at by importing words into the statute, which the Court had no power to do.

Mellish, Q.C., was not called on to reply.

KELLY, C.B. The conviction must be quashed. The information is laid against the appellant under the 108th section of the Towns Improvement Clauses Act, 1847, for so negligently using his furnace as not to consume the smoke. If that section stood alone, he would, perhaps, be liable to the penalty it imposes, but it is qualified by s. 55 of the special act, which provides that the words "consume the smoke" shall not mean in all cases "consume *all* the smoke," and remits the penalties, if the furnace is so constructed as to consume *as far as possible* all the smoke arising from it, and if the defendant has carefully attended to it, and has consumed the smoke *as far as possible*. It is to be collected from the case as stated, that the furnace in question is so constructed as to leave some of the smoke unconsumed, and that the consumption of the whole of the smoke can only be provided for in the mode and with the consequences pointed out; nor is any negligence shewn in the appellant's use of it, except in the omitting to consume the smoke in this mode. Now it appears that if the external air were so admitted, the temperature would not be equal, and the process of annealing would be impossible. The effect, then, of the case is, that it would be impossible for the appellant to carry on his trade at all with this furnace, if it were made to consume the whole of the smoke. We must take it, therefore, that the furnace is constructed to consume, and has consumed, as much smoke as can be consumed consistently with carrying on the appellant's trade; and the ques-

tion is, whether the appellant has "consumed as far as possible the smoke arising from it" within the meaning of the special act. Now, I apprehend these words mean. "as far as possible, consistently with carrying on the trade in an ordinary manner, and with a careful use and management of a properly constructed furnace." Construing them in this manner, and applying them to the facts as already stated, the appellant appears not to have transgressed the rule of the statute. No question arises as to whether the furnace is a nuisance: if it is, the appellant may be indicted; but we have only to decide whether he has violated the words of the statute under which he is charged.

CHANNELL, B. I am of the same opinion. The appellant is not charged by this information with not having so constructed his furnace as to consume its own smoke, but with the negligent use of a furnace, which we must suppose not to be faulty in its construction. The magistrate has in form found that there was negligence, but we are asked to determine, as a question of law, whether, on the facts stated, there was negligence within the meaning of the acts referred to; and I am of opinion that there was not. It was properly argued, that it is not sufficient for the appellant to say that it is for the benefit of his trade to conduct it in this mode. If the introduction of the air in the way pointed out would merely have made the process more slow or more costly, and so interfered with the profits of his trade, I am by no means satisfied that Mr. Keane's argument would not be right. But I draw from the case the inference, that the introduction of the air in this mode would render the manufacture of wire by this process altogether impossible. Now this is not a new process introduced for the purposes of obtaining a cheaper production, but its use was long anterior to the passing of either of the acts in question. Assuming this process, then, to be the ordinary mode of manufacturing wire, I am of opinion that, to bring the case within the acts, some other negligence must be shewn than that which consists merely in not adopting a plan, which would make the manufacture of wire by means of that process impossible.

FIGOTT, B. I am of the same opinion. Taking the two acts together, the penalty is not to be inflicted if the furnace in question

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is so constructed, and so used, as to consume as far as possible its own smoke. Here there is no complaint of the furnace being improperly constructed; if it were so in fact, the appellant might have been charged in a different form. But on the facts stated we must take the contrary to be true, and, assuming this, there can clearly be no negligence in the appellant's use of the furnace, when there is no other mode of using it so as to carry on the trade except that which he adopted.

Conviction quashed.

Attorney for appellant: *J. Webb.*

Attorney for respondent: *T. Stanbridge.*

Jan. 17.

FEW v. PERKINS AND OTHERS.

Landlord and Tenant—General Covenant to Repair—Covenant to Repair after Notice—Effect of Notice—Forfeiture, Waiver of.

An indenture of lease, with a clause for re-entry, contained a general covenant on the part of the lessee to keep the premises demised in repair, and a further covenant that he would, within three months after notice being given to him by the landlord, repair all defects specified in the notice. The premises demised being out of repair, the landlord gave the lessee notice to repair, "in accordance with the covenants" of the lease. Before the expiration of three months, ejectment was brought:—

Held, that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable.

EJECTMENT for a house and premises called the "Jolly Sailor," at Norwood, in the parish of Croydon, Surrey. At the trial before Willes, J., at the Surrey summer assizes, 1866, it appeared that by an indenture dated the 18th of July, 1835, William Saxby had demised the "Jolly Sailor" for thirty-five years to Sir Henry Meux, Bart., and Henry N. Smith, then being brewers and co-partners in trade. The plaintiff had afterwards purchased the reversion from trustees under Saxby's will; the defendant Perkins was under-tenant in possession, and the other defendants were the present partners in the brewery, in whom the lease had become vested, and who appeared to defend as landlords. The lease contained, in addition to the general covenant to keep in repair, the following clause: "It shall and may be lawful to and for William Saxby, his heirs

and assigns, twice or oftener in every year, during the said term, at all seasonable times in the day, to enter upon the tenement and premises hereby demised, or any part thereof, to view, search, and see the state and condition thereof, and of all decays, defects, and wants of reparation and amendment, which upon every such view or views shall be found, to give or leave notice or warning, in writing, at or upon the said demised premises, unto or for the said Sir Henry Meux and Henry N. Smith, their executors, &c., to repair and amend the same within three calendar months then next following, within which said time or space of three calendar months next after every such notice or warning shall be so given or left, as aforesaid, they, the said Sir Henry Meux and Henry N. Smith, for themselves, their executors, &c., do hereby covenant with the said William Saxby, his heirs, &c., to repair and amend all such decays, defects, and wants of reparation and amendment accordingly." There was also a clause for re-entry on breach of any of the covenants in the lease.

On the 22nd of January, 1866, the plaintiff sent a letter to Perkins, in these terms: "I beg to hand you a specification for works to be done at the 'Jolly Sailor.'" Enclosed in the letter was the specification. On the 29th of January the plaintiff sent the following notice to the lessees, Messrs. Meux & Co.: "I hereby give you notice to repair the house and premises called the 'Jolly Sailor,' South Norwood, in accordance with the covenants in a lease granted by Mr. William Saxby to Sir Henry Meux, Bart., and others, dated 18th of July, 1835, and I have left the specification with Mr. Perkins, at the 'Jolly Sailor,' for that purpose." On the 27th of April, before the expiration of three calendar months from the giving of this notice, the premises still being, as the plaintiff alleged, out of repair, this action was commenced. Two days previously the plaintiff had received the rent due up to the 25th of March. Under these circumstances a verdict was entered for the plaintiff, with leave to move to enter it for the defendants, on the ground that the giving of the notice of the 29th of January was a waiver of the forfeiture.

A rule having been obtained accordingly,

Denman, Q.C., and *Shaw*, shewed cause. The covenants in the

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lease are independent, and the landlord may rely on either: *Baylis v. Le Gros*. (1) The notice given was in general terms, and not as in *Doe d. Morecraft v. Meux* (2), a notice to repair "within three months." It calls upon the lessees to repair, "in accordance with the covenants." The landlord thus shews an intention to rely on all his rights under the lease. The case is similar to *Roe ex. d. Goatly v. Payne*. (3)

[CHANNELL, B. In *Doe d. Morecraft v. Meux* (2), rent was paid and received, as here, between the giving of the notice and the ejectment. It may, perhaps, have been considered that the receipt of rent was a waiver of the forfeiture. According to the judgment of Bayley, J., in that case, that circumstance seems to have influenced the decision.]

The forfeiture is a continuing one, so that the receipt of rent is immaterial. Moreover, the only act of waiver relied on in this case is the giving of the notice.

Garth, Q.C., and *Thesiger*, in support of the rule. The notice of the 29th must be construed with reference to that of the 22nd, which was only invalid because directed to the under-tenant, and clearly applied to the restricted covenant in the lease alone. *Roe ex. d. Goatly v. Payne* (3) is distinguishable. There the notice was to repair *forthwith*, and was therefore applicable, on the face of it, to the general covenant.

[KELLY, C.B. The notice here is to repair "in accordance with the covenants," in the plural.]

Upon a true construction of it, nevertheless, it is not clearly and unequivocally a general notice, and in case of doubt it should be construed against the landlord.

KELLY, C.B. I am of opinion that this verdict should not be disturbed. The lessee has in his lease covenanted generally to keep the premises in repair, and in case of his committing a breach there is a condition for re-entry by the lessor. There is also in the lease a proviso or covenant that the lessor may enter to inspect the premises, and in case he should find them out of repair, give notice to the lessees to repair within three

(1) 4 C. B. (N.S.) 537.

(2) 4 B. & C. 606.

(3) 2 Camp. 520.

months. These being the terms of the lease, the lessor gave two notices. The first could not be relied on, because it was not properly directed. The second was accordingly given, and required the lessees to repair the premises, "in accordance with the covenants" of the lease. This notice having been given, the repairs, we must take it for the present purpose, were not effected, and ejectment was brought. It is contended on the part of the defendants that the notice must be taken to refer to the second covenant to repair, and that the landlord was bound to continue the tenancy for three months after giving it. I cannot assent to that proposition. The case of *Doe d. Morecraft v. Meux* (1) does not apply to this case, for there the notice was specific to repair "within three months." If, therefore, it had been held to apply to the general covenant, it would have deluded the tenant. But here the notice is general in its terms, and similar to that which in *Roe ex. d. Goatly v. Payne* (2) was held to have no effect on the right of entry for a breach of the general covenant. The only difference between the two cases is, that here the notice is general, "to repair in accordance with the covenants;" there it was to repair "forthwith," agreeably to the covenant in the lease. But a notice to repair generally is, in effect, a notice to repair as soon as may be—forthwith, or in a reasonable time. Both notices have the same legal effect. I regard this, therefore, as the ordinary case of a general covenant in a lease, with a proviso for the landlord to enter in the event of a breach. He has pursued the usual, though not necessary, course of giving his tenant notice to repair. But he does not thereby lose his right of entry if the repairs are not effected by the tenant.

CHANNELL, B. For the purposes of this argument it is admitted that the premises are out of repair. That circumstance makes a *primâ facie* case of forfeiture under the covenants of the lease. The question is, whether that forfeiture was waived, and the answer depends on the covenants in the lease, and the terms of the notices to repair. Taking the dicta of Bayley and Holroyd, JJ., in *Doe d. Morecraft v. Meux* (3) as correct, I do not

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(1) 4 B. & C. 606.

(2) 2 Camp. 520.

(3) 4 B. & C. at pp. 609, 610.

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think they apply to the facts of the present case. I am of opinion that there has been no waiver of the forfeiture, and that this rule should therefore be discharged.

PIGOTT, B. I am of the same opinion. I do not think the notice of the 29th of January amounted to a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair.

Rule discharged.

Attorney for plaintiff: *S. W. Johnson.*

Attorneys for defendants: *Hunter, Gwatkin, & Hunter.*

Jan. 21.

SOWERBY *v.* COLEMAN AND OTHERS.

Custom—Unreasonableness.

A custom for inhabitants of a parish to exercise and train horses at all seasonable times of the year, in a place beyond the limits of the parish, is bad.

DECLARATION, for trespass with horses in land of the plaintiff called Lilley Hoo, in the manor of Lilley.

Second plea: an immemorial custom in the manor of Lilley, for the inhabitants of the parish of Lilley, in and adjacent to the said manor of Lilley, by themselves and their servants by their command, to enter at all seasonable times of the year, at their free will and pleasure, into and upon the said land, for the purpose of exercising and training horses thereon; averring that the defendant Coleman was an inhabitant of the said parish, and that Coleman, being such inhabitant, and the other defendants, as his servants and by his command, on divers days and times, being seasonable times of the year, broke and entered the said land of the plaintiff for the purpose of training and exercising the horses of the defendant Coleman, doing no more damage than was necessary, which were the trespasses complained of.

Demurrer and joinder.

Third plea: in the same words as the second plea, except that it claimed the customary right for the inhabitants of the hundred of

Hitchin and Pirton, in and adjacent to the said manor, and justified the trespass accordingly.

Demurrer and joinder.

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Archibald (*Sir G. Honyman, Q.C.*, with him), in support of the demurrer. The alleged custom is bad, for it offends against almost all the rules laid down with respect to customs in the *Case de Tanistry* (1) and elsewhere, and which are collected in Broom's *Leg. Max.*, 883-8, 4th ed. First, a custom is a local law, and can only operate within the limits of the place where it obtains; here, however, the custom averred is a custom "in the manor of Lilley," but the parish for whose inhabitants it is claimed is described as "in and adjacent to" the manor. The case is therefore within the anonymous case in *Dyer*, p. 363, pl. 27, with which agrees the doubt implied in the question of *Littledale, J.*, in *Blewett v. Tregonning*. (2) The only cases in which a right in the inhabitants of one parish to use the soil of another parish has been upheld are cases of necessity or public convenience, or where some consideration is given to the owner of the soil. Secondly, this custom is unreasonable. It amounts to a claim of a profit à prendre, or is at least within the reason on which such a custom is disallowed, for it excludes the owner of the soil from any beneficial use of it, and that without compensation: *Gateward's case*. (3) This is clearly so, if the words "seasonable times" are excluded, and those words put no clear limitation on the use. But, thirdly, these words themselves make the custom uncertain—it does not appear whether they mean seasonable for the land or seasonable for the horses, nor in either case is seasonable a word of definite meaning. Fourthly, the custom is wanting in continuance: it is a custom only for the benefit of those inhabitants who have horses to train, and there might be none such: *Selby v. Robinson*. (4)

The Court then called on

Coleridge, Q.C. (*H. Lloyd* with him), to support the plea. It is admitted that a custom to a profit à prendre is invalid, on the ground stated by Lord Campbell in *Race v. Ward* (5), viz. that

(1) *Davy*, 29.

(3) 6 Co. 59 b.

(2) 3 A. & E. at p. 572.

(4) 2 T. R. 758.

(5) 4 E. & B. 702; 24 L. J. (Q.B.) 153.

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the whole beneficial use of the owner might be destroyed by such a usage. But here no such right is claimed, and *Gateward's* case (1) and *Selby v. Robinson* (2) have therefore no application. The custom is to a mere easement, and is similar to those which were allowed in *Abbot v. Weekly* (3) and *Fitch v. Rawling*. (4) The custom is not uncertain or wanting in continuance, because the persons entitled to use it may be sometimes practically unable to do so; it is sufficient if their title is defined. Neither is it rendered uncertain by the limitation to seasonable times, for the Court will determine, either with or without a jury, whether the time is seasonable, as was done in *Bell v. Wardell* (5), where a custom over arable land, at seasonable times, was held not to have been followed in riding over the land when corn was standing upon it. Here the plaintiff might have replied that the time when the trespass was committed was not a seasonable one, and issue might have been taken upon that fact.

[KELLY, C.B. Is there any instance of such a custom as this having been successfully maintained, on behalf of the inhabitants of one parish, to be exercised in another parish?]

In *Mounsey v. Ismay* (6) a custom for the freemen of Carlisle to hold races on a close in the neighbourhood of the city on Ascension Day was successfully pleaded; and in *Tyson v. Smith* (7) a custom was allowed for *all* victuallers to erect booths at an annual fair, on making a nominal payment to the owner of the soil.

KELLY, C.B. I think these pleas cannot be supported. It was contended, and, but for the exception limiting the exercise of the alleged right to seasonable times, it would perhaps have been rightly contended, that a custom of this nature would be invalid, on the same ground on which a customary right to a profit à prendre is disallowed; for, the effect of a constant use by all the inhabitants of a parish of unknown extent over a piece of ground the extent of which is also unknown, might, and probably would, deprive the owner of all beneficial enjoyment of the soil.

(1) 6 Co. 59 b.

(2) 2 T. R. 758.

(3) 1 Lev. 176.

(4) 2 H. Bl. 393.

(5) Willes, 202, at p. 206.

(6) 1 H. & C. 729; 32 L. J. (Ex.) 94.

(7) 9 A. & E. 406.

The limitation to seasonable times would no doubt, in the case of arable land, introduce a qualification which might bring the case within the authorities cited. "There is no allegation, however, that the land in question is arable. But the ground on which I put my judgment, and which is, I think, conclusive of the question, is that this, being a custom of the nature above described, is claimed on behalf of all the inhabitants of one place, to be exercised and enjoyed in another and a different place. During the argument I put to the learned counsel for the defendant a question similar to that put by Littledale, J., in *Blewett v. Tregonning* (1): "Is there any instance where the inhabitants of one parish have established a claim to the exercise of such a right in another parish?" and I have received no satisfactory answer to that inquiry. One or two cases have indeed been cited which apparently conflict with our present decision, but they are not, in fact, opposed to it. One is the case of *Mounsey v. Ismay* (2), where the inhabitants of Carlisle successfully claimed a right to use a close in the neighbourhood of the city as a racecourse on a single day in the year. Another such case is *Tyson v. Smith* (3), where a custom of wide extent was sustained, on payment of a consideration to the owner of the soil, to use his soil for the erection of booths at a fair held during a few days in the course of the year. In these cases a custom was sustained, by which the owner of the soil was in fact restrained from any beneficial use of it for the time during which the right was exercised, but in neither case did this exclusion continue for more than a few days. The present case is totally different. Here all the inhabitants of the parish claim the right to go into the land of another person, and to use it for the purpose of exercising and training horses, at all "seasonable times" of the year; and construing that phrase, in conformity with *Bell v. Wardell* (4), to exclude the time when corn is growing on the land, yet, if the land be not arable, the exception is annihilated, and the right universal. Such a right, then, to exercise an indefinite number of horses, for an indefinite period of the year, would exclude the owner from the beneficial occupation of his property during probably the whole

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(1) 3 A. & E. at p. 572.

(3) 9 A. & E. 406.

(2) 1 H. & C. 729; 32 L. J. (Ex.) 94.

(4) Willes, 202.

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year, and cannot be sustained on behalf of a parish or district beyond the limits of the place where it is to be exercised. I will only add that a comparison of the second and third pleas shews the evil consequences which would flow from admitting the extension of such a right to inhabitants of another district. The claim tends to widen its extent, and, if held valid in the smaller division, might spread in the course of time to the neighbouring hundred, or even to the neighbouring county.

CHANNELL, B. I am of the same opinion. No substantial distinction has been pointed out between the second and third pleas, and the same judgment applies to both. I do not base my opinion on the ground that this amounts to a profit à prendre; I doubt whether it does. Nor, again, do I say that, if a compensation were made to the owner, the right might not be legally claimed; but I rest my judgment on the fact that the right, being of the kind already described by the Chief Baron, is claimed on behalf of the inhabitants of a parish to be exercised in a place not within the parish. If there were an allegation in the plea that the parish and the manor were co-extensive, or that Lilley Hoo lay within the parish, the right might perhaps have been admitted; but there is no such allegation. Neither is the right claimed on behalf of the inhabitants of the parish of Lilley, so far as it lies within the manor of Lilley; but it is only said that Lilley Hoo is in the manor of Lilley, and that the parish is in and adjacent to the manor. I also doubt whether the plea is not open to another objection. The right is claimed to exercise and train horses generally. It is true that in the justification it is said that the horses with which the trespass was committed were the horses of the defendant, an inhabitant of the parish of Lilley; but to support the plea, we must see that the custom is properly laid in the commencement.

PIGOTT, B., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *N. U. & C. Milne, for Hawkins & Co., Hitchin.*

Attorneys for defendants: *Dale & Stretton.*

PRIESTLEY v. PRATT AND ANOTHER.

*Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 125—
Reputed Ownership—Custom.*

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Where a custom exists for the buyer to leave goods bought in the hands of the seller, and is so notorious as to be practically known to all persons dealing with the seller in his business, goods so left in the hands of the seller for a time not longer than is clearly within the custom, do not on the bankruptcy of the seller pass to his assignees, under s. 125 of the Bankruptcy Law Consolidation Act, 1849.

TROVER to recover from the defendants, the assignees in bankruptcy of R. Grant, lambs and pigs, purchased by the plaintiff of the bankrupt before his bankruptcy.

At the trial before Mellor, J., at the Lincolnshire summer assizes, it appeared that the lambs and pigs, together with two steers, were bought on the 10th of July, 1865. The plaintiff paid for the whole, and removed the steers, but left the lambs, which were sucking, and the pigs, on the bankrupt's farm, until it should suit his convenience to remove them. On the 15th of July, Grant was made bankrupt on his own petition, and the assignees took and claimed to retain possession of the lambs and pigs, as in his order and disposition at the time of the bankruptcy.

Evidence was offered of a custom on the purchase of farm-stock to leave the animals bought upon the seller's premises, but the jury interposed, and said the evidence was unnecessary, for that there was a notorious usage and custom for the vendee of cattle to leave them in the hands of the vendor, for the convenience of the vendee, for a longer or shorter period, as might be arranged in each case.

Upon this a verdict was taken for the plaintiff for 49*l.*, with leave to the defendants to move to enter a verdict for them, on the ground that the animals were in the order and disposition of the bankrupt at the date of his bankruptcy.

A rule having been obtained accordingly,

Wills (Digby Seymour, Q.C., with him), shewed cause. He contended that as the jury had found as a fact, that a notorious custom existed for the buyer to leave the animals bought in the hands of

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the seller, the case was within the decisions of *Re Terry* (1); *Prismall v. Lovegrove* (2); and *Watson v. Peache*, (3)

The Court then called on

Field, Q.C., to support the rule. He relied upon *Thackthwaite v. Cock* (4) and *Knowles v. Horsfall* (5), and contended that a custom so alleged amounted to a general custom of England, for buyers to leave goods in the hands of sellers, until it suited their convenience to remove them. The case of *Watson v. Peache* (3) was distinguishable, on the ground that the bankrupt there was in the position of hirer of the barges, and a custom was proved to hire barges, and for the hirer to use them with his own name painted on them. It was not, therefore, as purchaser of the goods, but as the person letting them out to hire, that the defendant was there protected; but the present case was merely one of the purchase of goods, and if decided in favour of the plaintiff would almost have the effect of nullifying the reputed ownership clause in all such transactions.

KELLY, C.B. This rule must be discharged. The question before us, and it is a question on which we have power to draw inferences of fact, is, whether we are to hold, upon the evidence given at the trial, that these animals were in the order and disposition of the bankrupt within the meaning of the Bankruptcy Act, 1849. That question depends in all cases on whether there is shewn to exist, with respect to the articles in question, any custom of trade, so notorious as practically to be known to all who do business with those dealing in such articles, and who are called upon to consider the question of giving credit to them, by virtue of which goods, in reality the property of others, are allowed to remain in the actual possession and physical power of disposition of the bankrupt. Looking at the circumstances of this case, it is difficult to imagine a stronger case of a notorious custom—notorious to all who are acquainted with the practice of farming. There is here no question of opposing evidence, but the jury themselves interpose in the course of the evidence, and

(1) 7 L. T. (N.S.) 370.

(3) 1 Bing. N. C. 327.

(2) 6 L. T. (N.S.) 329.

(4) 3 Taunt. 487.

(5) 5 B. & A. 134.

say that the custom is so notorious as to make the evidence unnecessary. On this finding it must be taken that the custom was known to all who might be prejudiced by the apparent ownership; and that any one who was about to give credit to a farmer would not take it for granted that all the cattle he saw upon the farmer's land were his own, and give credit on that footing, but, conjecturing that they might be the property of others, would exercise a corresponding caution. Two cases were cited to us of *Thackthwaite v. Cock* (1), and *Knowles v. Horsfall*. (2) The former of these is not an authority which could weigh for a moment as an argument against our present decision; for there was there no custom openly and expressly found by the jury to be notorious, but, on the contrary, as was observed by the Chief Justice (3), there was no satisfactory evidence of a usage counter-ailing the operation of the statute. The case of *Knowles v. Horsfall* (2) is stronger, and entitled to much consideration; but the decision is there put chiefly on the ground that there was no notice to the world, nothing to induce persons to suppose or conjecture that the brandy in question might be the property of some other person than the bankrupt; and that to take the case out of the operation of the statute, some evidence must be given to satisfy the jury that the property may well be supposed to belong to some third person. It is to be observed that the learned judges in that case refer to the custom as known only in the wine trade at Liverpool; they do not even speak of a custom notorious in the trade generally to leave goods purchased for a greater or less time in the hands of the vendor. We must then suppose that such a state of circumstances as we have before us was not present to their minds, or that the facts did not warrant the conclusion, that there existed any such notorious custom as is here proved. If, however, we were to suppose such a notorious custom to have been satisfactorily proved, we should have to consider whether that decision is not opposed to the whole course of recent authority. Without relying on *Re Terry* (4) in the Bankruptcy Court, although that case was decided by a very learned person, of great experience in this branch of the law, the case of *Prismall v. Lovegrove* (5), in

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(1) 3 Taunt. 487.

(2) 5 B. & A. 134.

(3) 3 Taunt. at p. 491.

(4) 7 L. T. (N.S.) 370.

(5) 6 L. T. (N.S.) 329.

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conformity with other modern cases, establishes, that wherever a custom exists so notorious that it may be presumed to be known to all persons engaged in the business, that the buyer should leave the goods bought in the hands of the seller for a certain time, and they are not left for a longer time than is clearly within the custom, they are taken out of the reputed ownership clause, and the buyer is entitled to recover them from the assignees in bankruptcy of the seller. The present case falls within that description, and the plaintiff is therefore entitled to recover.

PIGOTT, B. I am of the same opinion. A notorious custom has been clearly found for the buyer to leave the animals bought in the possession of the seller, and that being so, it appears to me to fall exactly within the description given by Mansfield, C.J., in *Thackthwaite v. Cock* (1), of the custom required to take goods out of the reputed ownership clause; it is "such a custom, that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor." As to *Knowles v. Horsfall* (2), I agree with the observations of the Chief Baron upon it; and I will add that at the time when that case was decided the struggle of the Courts was rather to give as much as possible to the assignee, than to discover the true owner.

Rule discharged.

Attorneys for plaintiff: *Rogerson & Ford, for Brown & Son, Lincoln.*

Attorney for defendants: *Glasier, for Williams, Lincoln.*

(1) 3 Taunt. at p. 491.

(2) 5 B. & A. 134.

HOGGARTH v. TAYLOR.

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Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Deed under s. 192—"Creditor"—Unliquidated demand—Release.

To an action for unliquidated damages for breach of contract by a wrongful dismissal of the plaintiff from the defendant's service, the defendant pleaded a deed under the Bankruptcy Act, 1861, s. 192, between the defendant (the debtor), two sureties, and the creditors of the defendant, by which the debtor and sureties covenanted to pay a certain composition in a specified time, the payment to be secured by joint and several promissory notes. In consideration of the premises, the creditors released the debtor "from their respective debts, and all claims and demands in respect thereof." The plaintiff did not assent to or approve of the deed :—

Held, that the plea was no answer to the action, the claim of the plaintiff being for unliquidated damages.

Woods v. De Mattos (Law Rep. 1 Ex. 91) distinguished.

DECLARATION. On an agreement in writing made on the 23rd of May, 1864, between the plaintiff and the defendant, whereby the plaintiff agreed with the defendant, for the consideration therein mentioned, that the plaintiff would for two years from the 25th of May serve the defendant as clerk in his business of contractor, and do all things pertaining to the office of clerk, and in consideration of the premises, the defendant promised the plaintiff to pay him 90*l.* a year during the period of two years, to provide him with a house rent free, to pay the rates and taxes incident thereto, and to instruct him in the business of a contractor. Averment of the performance of all conditions, &c. Breaches : first, that the defendant wrongfully dismissed the plaintiff before the expiration of two years ; secondly, that he did not provide the plaintiff with a house rent free ; thirdly, that he did not pay the rates and taxes incident thereto ; and fourthly, that he did not instruct the plaintiff in the business of a contractor.

Plea : setting out verbatim the provisions of a deed dated the 13th of September, 1865, after the accrual of the plaintiff's claim, under s. 192 of the Bankruptcy Act, 1861, between the defendant (the debtor), R. Taylor and W. Taylor, and the creditors of the defendant, whereby the defendant, and R. Taylor and W. Taylor, jointly and severally covenanted with the creditors to pay them a

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composition of 7s. 6d. in the pound by two instalments of 5s. and 2s. 6d., to be paid at the expiration of six and twelve months respectively from the date of the deed, the instalments to be secured by the joint and several promissory notes of the defendant, and of R. Taylor and W. Taylor, bearing even date with the deed. And the creditors, in consideration of the premises and the covenant, released the defendant *from their respective debts, and all claims and demands in respect thereof*, except the said covenant and promissory notes. Averment of performance of all conditions necessary to make the deed as binding on all the creditors of the defendant as though they were parties thereto, and that the deed was as binding on the plaintiff as though he had been a party thereto.

Demurrer and joinder.

Replication, that although twelve months from the date of the deed had elapsed, no promissory notes had been delivered to the plaintiff, nor had any composition on the plaintiff's debts and claims been paid to him.

Demurrer and joinder.

[The ground of demurrer to the replication was that the release in the deed was immediate and absolute, and did not depend on the performance of the covenants contained in the deed. The decision of the Court, however, renders further notice of this point unnecessary.]

Quain, Q.C., in support of the demurrer to the plea, contended that the deed and the release contained in it were confined to debts, or claims in respect of debts, existing at the date of the deed, and for which promissory notes for liquidated sums could be then given.

The Court called on

R. G. Williams to support the plea. First, the deed is entered into between the defendant and his "creditors," and, according to *Woods v. De Mattos* (1), a "creditor" in s. 192 of the Bankruptcy Act, 1861, means any one who could prove, in case of a bankruptcy, against the bankrupt's estate. The present plaintiff could have proved, although his demand is for unliquidated damages. He

was subject in all respects to the jurisdiction of the Court of Bankruptcy (s. 197), and was *bound* to avail himself of the provisions of s. 153, which provides a machinery for the ascertainment of unliquidated claims: *Saunders v. Best*. (1) The plaintiff, therefore, was a "creditor" in respect of his whole claim, and as such, was bound by the deed. Secondly, the release is sufficiently general in its terms to include an unliquidated demand. It is true that the release is of "debts;" but that word must be interpreted in the extended sense indicated in the Bankruptcy Act, 1861, and therefore includes all claims, liquidated or unliquidated, which are proveable in case of a bankruptcy.

Quain, Q.C., was not called on to reply.

KELLY, C.B. There are several sections of the Bankruptcy Act, 1861, namely sections 192—198, which afford a certain degree of protection to debtors who execute and duly register a deed of the nature alleged in this plea. The certificate of registration is to operate for all purposes as a protection in bankruptcy, and there is also (s. 198), an express provision, that no "creditor"—and I am willing to interpret the word "creditor" in the widest sense—shall avail himself, without leave of the Court, of any execution against the debtor's property, or process against his person, after notice of the filing and registration of a deed under s. 192. There, however, the benefits conferred by the act cease. Whether a deed like the one now under discussion is pleadable in bar is another question. There are many actions, even for specific sums of money, where such a deed could not be so pleaded. Thus, it can only be so pleaded where it contains an absolute and immediate and unconditional release operating on the demand of the particular creditor who brings the action. Without such a release such a deed would not be a bar. Now in the present case it seems next to impossible to devise an argument which will support the plea. The action is brought for unliquidated damages for a wrongful dismissal. The deed only releases specific and ascertained debts, for which it is further provided that promissory notes are to be given. Except as to debts of that description the deed furnishes no answer. There is no release of claims which may perhaps afterwards be

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converted into specific debts. Nor could promissory notes be given in respect of claims of that nature. I do not give any opinion as to whether or not there may be power after the execution of a deed like this to apply to the Court of Bankruptcy for the conversion of this demand into a debt, or as to whether the machinery applicable in case of a bankruptcy, can be applied here. But assuming that the plaintiff might become a "creditor," after adopting the process indicated in s. 153 of the act, still, until that process has been adopted, there is nothing on which a release in the terms contained in this deed can operate. I am therefore of opinion that the plaintiff is entitled to our judgment.

MARTIN, B. I am of the same opinion. The declaration is on an agreement whereby the defendant promised to employ the plaintiff as a clerk in his business for two years, and the principal breach alleged is, that the defendant wrongfully dismissed him before the expiration of that period. The transaction may have been an entry on the 25th of May, 1864, by the plaintiff in his employment, and a discharge on the next day, long before this deed was executed. To this cause of action a deed under the Bankruptcy Act, 1861, is set up as an answer; but I think the words used in it do not apply to this case. Whatever construction we may put on the act of parliament, we must construe deeds such as these, like all other deeds, by the usual rules of interpretation. Now this deed only deals in terms with the debtor and his creditors, in the ordinary meaning of the words. I wish to say nothing either for or against the decision in *Woods v. De Mattos*. (1) I regard that case as no authority for the present decision. We have to give effect to the deed according to its express provisions, and not to strain it to bring it within the alleged intention of the Bankruptcy Act. I think the plaintiff is entitled to our judgment.

CHANNELL, B. I am of the same opinion. I think that this plea is bad. It cannot be contended that it is an answer to this action unless it absolutely releases the plaintiff's claim; therefore, apart from the case of *Woods v. De Mattos* (1), the point would be

scarcely arguable. The release is of *debts* due to the defendant's creditors. As to the case of *Woods v. De Mattos* (1), that decision was, I think, correct, but it does not govern this case. There the Court had merely to ask whether, under the circumstances, the deed could be enforced; and there was no such difficulty as exists here. The action there was not like the action here, but was on a bill of exchange, and the plaintiff was a "creditor" to the amount of that bill, and not for any unliquidated sum. We can hold, consistently with that case, that this deed is not pleadable in bar.

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PIGOTT, B. I am of the same opinion. Whatever construction may be placed on the term "creditor," the parties to this deed meant to do no more than to compound for specific debts. The release in the deed has no application to such a claim as is made by the plaintiff in this action.

Judgment for the plaintiff.

Attorneys for plaintiff: *Parker, Rooke, & Parkers.*

Attorneys for defendant: *Johnson & Weatheralls.*

BUTLER v. KNIGHT.

Jan. 22.

Attorney and Client—Compromise—Retainer—Negligence.

If the plaintiff in an action continues the authority of his attorney after judgment, by allowing him to proceed to obtain satisfaction, the attorney retains the power to bind his client by a compromise.

DECLARATION stating the retainer of the defendant as attorney for the plaintiff in an action of *Butler v. Ruffe*, and that judgment was recovered in that action for 300*l.* damages and 90*l.* costs.; that afterwards, and whilst the defendant was acting as such attorney for the plaintiff, he negligently and wrongfully omitted to enforce the judgment against Ruffe, and wrongfully and improperly, without the authority and consent, and against the will, and contrary to the directions of the plaintiff, agreed with Ruffe to accept 100*l.* in full satisfaction and discharge of the judg-

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ment, and accepted the payment of the same, whereby the plaintiff lost the benefit of the judgment, and the benefit of the costs in the action, amounting to 105*l.*, which she paid to the defendant as her attorney in the said action.

Plea, not guilty, and issue thereon.

The cause was tried before Keating, J., at Stafford, at the last summer assizes, when it was proved that the present plaintiff had brought an action for breach of promise of marriage against one Ruffe, and retained the defendant to conduct it. That action was tried at Warwick, on the 12th of July, 1864, and a verdict was obtained for 300*l.*, on which judgment was signed on the 27th of July. The plaintiff gave no formal instructions to the defendant to continue to act as her attorney in enforcing the judgment; but immediately after the trial she directed him not to compromise the matter, and said that she would not shew Ruffe any clemency; she afterwards repeated the same instructions. The defendant, however, having reason to believe that Ruffe was in insolvent circumstances, and having with some difficulty obtained from Ruffe's brother the promise of 100*l.* for a compromise of the action, he on the 16th of August agreed to a compromise on these terms, and received the 100*l.* In this he acted apparently with the consent of the mother and brother-in-law of the plaintiff, with whom he principally communicated in the business relating to the action. But the plaintiff repudiated the arrangement, and refused to sign the satisfaction-piece, and now brought this action.

The defendant's counsel claimed a nonsuit, on the ground that if the defendant had authority to settle, there was no cause of action; and that if he had not, the plaintiff was not bound by the compromise. The case was left to the jury, who found that the defendant entered into the arrangement contrary to the plaintiff's directions, and gave a verdict for 50*l.*, if the plaintiff could still enforce her judgment against Ruffe, and for 300*l.* (giving credit for the 100*l.* received) if she could not enforce it.

A rule having been obtained, pursuant to leave reserved, to enter a nonsuit, or for a new trial on the ground that the verdict was against the weight of evidence, and that the damages were excessive,

Powell, Q.C., and *G. Browne*, shewed cause. There was clearly a cause of action; the defendant has acted contrary to his client's instructions, and this alone would entitle the plaintiff to nominal damages: *Fray v. Voules*. (1) But the damages ought to be substantial, for the injury suffered is real. Even supposing the plaintiff was not bound by the compromise entered into on her behalf, the jury have found that there was a loss of 50*l.* caused by the neglect to enforce execution. But, in fact, she was bound; the defendant was undoubtedly acting as her attorney in the negotiations with Ruffe and his brother, and no notice of any limitation of his authority was given to those with whom he was dealing. As attorney he had power to enter into a compromise on his client's behalf, and the plaintiff cannot, therefore, now enforce her judgment: *Chown v. Parrott* (2); *Prestwich v. Poley* (3); Lush Pr. 256, 3rd ed.; Vin. Ab. tit. Attorney (P.) pl. 6, 7, 8. Here again the jury have found as a fact, that the loss suffered by the plaintiff was (giving credit for the 100*l.* received) 300*l.*, or the full amount of the verdict, and this finding the Court will not disturb.

Huddleston, Q.C., and *Macnamara*, in support of the rule. It is an error to say that the defendant acted as the plaintiff's attorney in effecting the compromise. The retainer ceases at judgment. After that time the attorney cannot represent the client without a new authority, *Macbeath v. Ellis* (4); the client may, without any order to change attorneys, sue out execution by a different attorney from the one who has conducted the cause, *Tipping v. Johnson* (5); the attorney cannot sue out execution against his client's wish, *Barker v. St. Quintin* (6); his authority is not sufficient to entitle the sheriff to release the defendant from custody, *Savory v. Chapman* (7); nor can he release the debt or damages after judgment, 1 Roll. Abr. 291, tit. Attorney (M), pl. 2. The cases cited on the other side have, therefore, no application, because in both the compromise was made by the attorney in the course of the cause, and

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(1) 1 E. & E. 839; 28 L. J. (Q.B.) 232.

(4) 4 Bing. 578.

(2) 14 C. B. (N.S.) 74; 32 L. J. (C.P.) 197.

(5) 2 B. & P. 357.

(6) 12 M. & W. 441.

(3) 18 C. B. (N.S.) 806; 34 L. J. (C.P.) 189.

(7) 11 A. & E. 829.

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before judgment. The case of *Bevins v. Hulme* (1) is apparently opposed to the present contention, but the opinion of Parke, B., there expressed (2), is not supported by the authorities cited, and the decision was only that the declaration was bad for not averring the money to have been received by the defendant on his original retainer as attorney in the suit. The defendant's view is confirmed by Rule 80, Hilary Term, 1853, which requires the satisfaction-piece to be signed by the party himself: see Chitty, pp. 88, 722, 12th ed. But further, this rule of law must be taken to have been known to Ruffe, so as to give him notice that the defendant's authority was limited; it was not, therefore, necessary for the plaintiff to give him express notice, and she will not be bound as having held out the defendant as empowered to make the compromise. The compromise, then, is not binding on the plaintiff, and she has suffered no injury, but can now enforce her judgment; and it seems, according to the opinion of Wightman, J., in *Harrington v. Binns* (3), that in such a case, where there is no damage, there is no cause of action. But supposing the plaintiff to have suffered some damage, the verdict is clearly excessive, for there is no reason to suppose that the whole amount could have been recovered.

KELLY, C.B. There can be no doubt that in effecting this compromise the defendant acted *optimâ fide*. Whether or not he was right in his estimate of the degree of Ruffe's solvency and responsibility was a question for the jury, but he believed that he was doing the best in his power for his client. It is contended that no action is maintainable, but on what grounds I am at a loss to understand. Whatever may have been the legal extent of the defendant's authority, he was undoubtedly acting as the plaintiff's attorney; and it does not lie in his mouth to say that the relation of attorney and client did not subsist between them. If it did, and if in the course of it he did any act affecting that client's interests, and directly contrary to her instructions, it is impossible to say that he is not liable. The action then is clearly maintainable.

The question of damages next arises. The defendant contends

(1) 15 M. & W. 88. (2) 15 M. & W. at p. 96. (3) 3 F. & F. 942.

that they ought to be merely nominal, or, at least, smaller than those given, on the ground that the compromise was made without authority, and had no effect on the plaintiff's rights, and that she can therefore still pursue her remedy against Ruffe. But I think this is not so. Several decisions and dicta were cited in support of this contention, some of considerable antiquity, but still authorities which we respect, and by which, so far as they are decisions, we are bound. Modern authority was also cited, establishing the general proposition that the force of an attorney's retainer is at an end, and his power to bind his client by a compromise ceases, when judgment is recovered. We fully admit the general proposition, and it will operate wherever there are no circumstances impairing its effect. We are bound by authority to admit it as a technical rule, but we are equally bound not to extend that rule one hair's breadth, since its effect on transactions in the relation of attorney and client is directly opposed to the common action and understanding of mankind in such matters. To whom does it ever occur, except to a technical lawyer, that unless something further is done to re-establish the attorney's authority, it ceases at judgment, and that without new instructions the steps necessary to obtain the fruits of the litigation cannot be taken? It would be very mischievous to hold, in any case where evidence existed of the relation of attorney and client having been continued or recreated, that the attorney had not authority to act according to the exigency of the case. Assuming that, on the authority of the decisions cited, the retainer here was at an end on the 27th of July, when judgment was signed, was anything done to re-establish the relation? First, communications went on between the defendant and various members of the plaintiff's family as before, without any suggestion on either side that the relation had ceased. As against the plaintiff, however, this might not be sufficient, for we cannot perhaps say that the facts shew her to have given a general authority to those relations to manage the affairs of the suit. But we find the plaintiff herself, almost immediately after the verdict, communicating with the defendant as her attorney, and giving him express instructions as to the payment of the sum awarded by the verdict. The implied authority to recover the amount of the verdict, the payment of which might have to be enforced by execution, shews

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that the plaintiff contemplated that the defendant would hold communications with Ruffe, and, if necessary, take proceedings against him. Even the prohibition to compromise, though intended to limit and direct his action, shews that she supposed the defendant would continue to act as her attorney until the whole proceedings were brought to an end, as if no such technical rule had existed. On the other hand, nothing seems to have passed pointing to a cesser of the relation, and we must therefore take it that that relation was continued with its usual authority, limited only by private instructions, of which no notice was given to the other side. If, therefore, the plaintiff now attempted to enforce her judgment against Ruffe, or brought an action on that judgment, Ruffe might safely plead the compromise with her through the medium of her attorney, or apply to the Court on this ground to stay proceedings.

[His Lordship then examined the evidence as to damages, and said that it was not a case in which the Court could say that substantial damages ought not to be given, but that 300*l.* was too large a sum ; and that the rule ought to be discharged on the plaintiff's consenting to reduce the verdict to 150*l.*, otherwise, the rule to be made absolute.]

CHANNELL, B., concurred.

PIGOTT, B. I quite concur with my Lord. No doubt the technical rule is as has been stated by the defendant, but it is subject to this qualification, that the authority may be renewed by any acts shewing the client's intention that his attorney shall still continue to act in that relation. The question, therefore, is, whether there is such evidence here. I think there is. The plaintiff becomes aware after the trial that the defendant is still acting as her attorney in endeavouring to obtain satisfaction, and she does no act to indicate dissent, but only prohibits him from taking less than the whole amount of the verdict. By this she recognises him as her attorney, and therefore as her agent with all those powers which an attorney commonly possesses, including the power to compromise. He binds her by the exercise of this power, but violates his duty in so doing, and cannot therefore

escape liability in this action. With respect to the damages also, I agree with the Chief Baron.

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*Rule discharged on plaintiff's consenting to reduce the damages to 150*l.*, otherwise to be made absolute. (1)*

Attorney for plaintiff: *H. C. Barker.*

Attorneys for defendant: *Smith & Shepherd.*

LATHAM v. LAFONE.

Jan. 30.

Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 198—Protection—Letter of Licence—Unreasonable Deed—Construction.

A letter of licence is not a deed within the Bankruptcy Act, 1861.

A deed, executed by the defendant as debtor, was assented to by the statutory number of creditors, and registered with the formalities necessary for the registration of a deed under s. 192 of the Bankruptcy Act, 1861. After a recital that the debtor was indebted to his creditors "in several sums of money," the creditors granted him a letter of licence for twelve months, and covenanted not to sue him during that time, and that to any action or proceeding on their debts during that time the deed might be pleaded as a release and discharge. The deed contained no schedule of creditors or of debts, it provided no composition, nor contained any covenant for payment of debts, nor conveyed any property, nor made any provisions with respect to the carrying on of the debtor's affairs. The defendant having been arrested at the suit of a non-assenting creditor:—

Held, that the certificate of registration was no protection under s. 198, on the ground (per Kelly, C.B., and Martin, B.) that, as a deed to bind non-assenting creditors, the deed was unreasonable; and (per Martin, Channell, and Pigott, BB.) that it was not a deed of such a kind as was described by either s. 192 or s. 194 of the Bankruptcy Act, 1861.

THE plaintiff in this action signed judgment on the 20th of December, and on or about the same day the defendant executed the following deed:—

This indenture, made the 20th day of December, 1866, between the several persons, companies, and co-partnership firms, whose names and seals are hereunto subscribed and affixed, or who have in writing assented to these presents by themselves, or their respective partners, agents, or attorneys, being respectively creditors of H. Lafone, of Liverpool, merchant, and hereinafter called the said

(1) Leave to appeal was asked for, but refused.

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creditors, of the one part, and the said H. Lafone of the other part. Whereas the said H. Lafone is indebted to the said creditors in several sums of money, which he is not at present able to pay, by reason of his principal assets being abroad. Now this indenture witnesseth, that in consideration of the premises, they, the said creditors do, and each of them doth hereby grant unto the said H. Lafone, licence to come, go, pass, and repass from place to place, when and as his business and occasions shall require, for the time of twelve months from the date hereof, without being sued, arrested, or molested in his person or otherwise, for or on account of any debt, sums of money, or other thing, whereby or whereof he is or may be in any wise charged, or chargeable, or indebted to the said creditors, or any of them, or their or any of their respective partners. And each of them, the said creditors, so far as relates to the acts and deeds of himself and his partners, and his and their heirs, executors, and administrators, doth hereby for himself, his heirs, executors, and administrators, covenant with the said H. Lafone, his executors and administrators, that they the said covenanting parties, or their respective executors, or administrators, partners or partner, or any other person, by, with, or through their, or any of their, order, privity, or procurement, will not at any time hereafter during the said term of twelve months, sue, arrest, attach, extend, impede, or molest the said H. Lafone, his heirs, executors, or administrators, or his or their bodies, goods, or estates, for or on account of any debts or sums of money which he now owes, either solely by himself, or jointly with or for any other person or persons, or for or on account of any other thing, where-with he or they now is, or shall, or may be charged or chargeable. And that these presents may be pleaded in any court of law or equity as a bar, and in discharge of all and every action, suit, and other proceeding, judgment, and execution, which shall or may be brought, commenced, sued, prosecuted, or taken against him, the said H. Lafone, by his said creditors, or any other person or persons, by, with, or through their or any of their acts, privity, order, or procurement. In witness, &c.

This deed was registered on the 3rd of January, under the Bankruptcy Act, 1861, with the formalities necessary for the registration of a deed under s. 192. It was not executed by any of the

creditors, but the statutory number had assented to it. There was no schedule of creditors, but the affidavit of debts required by the order of 22nd of May, 1862, was filed. Although the deed conveyed no property, it was stamped with the maximum ad valorem duty of 200*l.*, imposed by s. 195.

On the 7th of January, the defendant was arrested on a ca. sa. at the suit of the plaintiff, who was a non-assenting creditor; and the officer refusing to release him on the production of the certificate of registration, he on the 9th of January took out a summons before Martin, B., at Chambers, for his discharge from custody. The learned judge made an order for his discharge, on payment into court of the amount of the plaintiff's claim, with liberty to the defendant to apply for the payment for the money out of court, if the Court should think the deed a good deed within the Bankruptcy Act, 1861.

A rule having been obtained accordingly,

Quain, Q.C., and *Crompton*, shewed cause. The deed is unreasonable. No consideration of any kind is given to the creditors for their covenant not to sue. The debtor gives no security for the payment of his debts; he does not even enter into a covenant to pay. The effect of it is to put the whole of the assets in his power, and to prejudice the creditors by the postponement of their claims, without substituting any new remedy. But, secondly, the deed is not within the description of deeds in the act. (1) The object of the 192nd and following sections of the act was, to substitute for the

(1) The introductory words, and the material words of ss. 192, 194 of 24 & 25 Vict. c. 134, are as follows:—

As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor.

Section 192. "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid," &c.

Section 194. "Every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys, or covenants or agrees to convey, his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall" be registered (as therein mentioned).

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ordinary operation of a bankruptcy, deeds under which the debtor was to obtain a similar discharge, on terms agreed upon by his creditors. But the present deed gives no discharge; it is nothing but a letter of licence, the name and operation of which were perfectly well known before the act, and which would have been distinctly mentioned if it had been intended to include it. The introductory words of s. 192 are an index to the contents, and if a deed is not within any of those terms, it is not within the section. The present deed is not within them, for it is neither a deed of trust for the benefit of the creditors, nor a deed of composition, nor a deed of inspection. Neither is it within the words of the section taken by themselves. It does not relate to the debts or liabilities of the debtor and his release therefrom, for it only professes to give time; neither does it relate to the "distribution, inspection, management, and winding-up of his estate, or any of such matters."

The Court called on

Brett, Q.C., and *Holker*, to support the rule. First, this is a composition deed. The proper description of a composition deed is, that it is a deed by which the creditors, who cannot obtain present payment of their debts in full, agree with one another to limit their rights for their mutual advantage. The consideration which supports such a compact is not one moving from the debtor to the creditors, but one moving from the creditors to one another. Each agrees to be placed on a different footing, in consideration of all the rest agreeing to do the like. But if it is necessary that there should be some benefit moving from the debtor, there is such a benefit here, for the recital amounts to a covenant to pay the debt in full at the end of twelve months, and this has on the principle of *Clapham v. Atkinson* (1) been held sufficient to make a deed good under the act. The right which the creditors forego is, the right to be paid at once; the benefits which they receive are, the better chance which they have of being paid in full at the end of twelve months, by their all allowing the debtor time to realize his assets, and the covenant which he enters into to pay at the end of that time. Such a provision for a deferred payment was the substance of the deed which was upheld in *Stone v. Jellicoe*. (2) Secondly, a release is not necessary, for the

(1) 4 B. & S. 730; 34 L. J. (Q.B.) 49.

(2) 3 H. & C. 263; 34 L.J. (Ex.) 11.

words of s. 192, "or any of such matters" extend to the words "relating to his debts or liabilities, and his release therefrom," and sever them. But if a release is necessary, that word does not mean necessarily an absolute and unconditional release. The covenant not to sue for twelve months, coupled with the proviso that the deed may be pleaded in bar, satisfies the word: *Corner v. Sweet*. (1) Thirdly, the words of the section are not narrowed by the heading; and if the deed is not within the heading, it is at least a deed relating to the management of the debtor's estate; there is an affidavit of property, and the deed is stamped under s. 195. Its effect is to enable the debtor to realize his assets, and it is not to be assumed that he will act *malâ fide*.

KELLY, C.B. This rule must be discharged. The question is, whether this is a valid deed within s. 192 of the Bankruptcy Act, 1861. First, it is contended that it is not of such a description as to come within that section at all, and the introductory words of the section are relied on to limit its operation. Now certainly this is not a *trust* deed; no trustee is appointed by it, nor is any trust created. Whether it is a composition deed is open to argument; if I were compelled to decide the point, I should say it was not, and that that phrase must be understood in its ordinary acceptation, as meaning a deed by which the creditors agree to receive a smaller sum in place of a greater one. Nor is it an inspectorship deed; for it contains no provisions for the inspection or carrying on of the debtor's trade. And further, the term letter of licence, which properly describes the deed before us, has a distinct and well-understood meaning; and had it been intended to include such deeds in the section, one cannot but think that that phrase would have been used instead of the ambiguous expressions above mentioned. But I should be sorry to decide the case on so narrow a ground, especially as in cases under this act, deeds of this kind have sometimes been treated as composition deeds within the section.

But, although we may refer to the introductory words of the section to put a construction on a doubtful part of the statute, yet if the language of enactment is clear, and includes in express terms such

(1) Law Rep. 1 C. P. 456.

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an instrument as this, we should not be justified in limiting that sense by the introductory words. The words then of the section are, "Every deed . . . relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate or any of such matters." The second part of the sentence is in the disjunctive, but the present deed is certainly not within any member of it. The question then arises whether the first part of the sentence is to be read in the conjunctive—that is, whether the deed must relate both to the debts or liabilities of the debtor *and* to his release therefrom, or whether it is sufficient if it relates to the debts and liabilities alone; for certainly there is in this deed no release in the common sense, but only a provision for suspending the rights of creditors executing or bound. I should be disposed to construe the words as meaning any deed relating to the debtor's debts or liabilities, which may or may not provide also for his release therefrom; and I should not therefore have felt on this ground any insuperable difficulty in admitting the deed, had I been compelled to decide the matter upon the construction of these expressions.

But, on the broad ground of the unreasonableness of the provisions of the deed, I decide that it is not within the operation of the act. Looking to the general scope of the enactment, I am of opinion that the intention of the legislature was, to leave to the majority of the creditors the decision of all questions of expediency as to the affairs of the insolvent debtor, but to reserve to the courts of law the determination of the reasonableness of their arrangements. The act has for the first time conferred on a specified majority of creditors the power to bind the rest by their informally given vote; but the protection of the interests of the remainder is committed to the law, and before we can hold the deed binding upon non-assenting creditors, we must see that it is not unreasonable in the mode in which it affects them. Now this deed conveys nothing; it makes no provision for the inspection of the debtor's estate, so as to secure a fund for the payment of debts, and not the slightest benefit in the way of composition is derived under it by the creditors. If there were any such benefit, however small and however distant, it might perhaps not be unreasonable that the

non-assenting creditors should be bound. But the deed is, simply and unconditionally, an agreement to give the debtor twelve months to collect his assets and pay his debts. Now this clearly gives him the power, immediately on the execution of the deed, to make away with his assets, and leave his creditors without the possibility of recovering their debts. But it is contended that there is an implied covenant to pay all the creditors in full at the end of twelve months. If there were indeed an express or an implied covenant to that effect, without pronouncing an opinion as to the validity of the deed in that case, I should hesitate to say that it was unreasonable or void. The deeds in the cases referred to (1) did contain such a covenant, though only for a composition; and small and distant as the advantage is, yet, if the creditors think fit to accept it, it is within the act. But it is not possible in law to put such a construction on this deed. 'There is no recital, such as has been assumed to exist, by which the debtor admits that he owes certain sums of money to his creditors. There is no schedule of creditors referred to in the deed—the parties to the deed are only creditors actually executing or assenting; and the recital only states that the debtor is indebted to the said creditors "in several sums of money," but admits nothing specific. There is nothing, therefore, by which the debtor can be held, by implication or otherwise, to have covenanted to pay the amount of his debts. See, then, what will be the effect of this deed on a debt, against which the statutory limit of time expires during the twelve months' credit which is given. There is nothing here amounting to a sufficient acknowledgment to take the debt out of the statute; nothing to put the creditor in any different position with respect to it, except that by the lapse of the time during which his right of action is suspended, the debt is barred. If there were no other objection than this, it would be enough to shew the unreasonableness of the deed. On that ground, therefore, my opinion is that this rule must be discharged.

MARTIN, B. I am of the same opinion. I think the proper rule for construing this statute is to adhere to its words strictly; and it is my strong belief that by reasoning on long-drawn infer-

(1) See *Reeves v. Watts*, Law Rep. 1 Q. B. 412, and the cases there referred to.

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ences and remote consequences, the Courts have pronounced many judgments, affecting debts and actions in a manner that the persons who originated and prepared the act never dreamed of. It is better, I think, if we cannot find words which by strict grammatical construction, and according to their ordinary acceptation, refer to the matter before us, to say that the act is defective, and to refuse to decide otherwise than according to the antecedent law. This case, however, seems to me to be pretty clear. In what the Chief Baron has said as to the unreasonableness of the provisions of the deed, I entirely concur, but I will add this further observation. The covenant not to sue Lafone extends to debts in which he is indebted jointly with any other person. The hands, therefore, of the joint creditor are tied up, not only as against Lafone, but as against the joint debtor, who has no other connection with Lafone or his affairs than that he is jointly indebted with him to the same person, and who is freed from liability to suit, for no other reason than that Lafone has become insolvent and executed this deed. It cannot have been intended that all joint creditors should be placed in this position.

But I go further. I think this deed is not within the words of the act, and this is not the first time I have had to consider the question. Various applications were made at Chambers at the end of last year, under the Bills of Exchange Act, 1855, for leave to appear and defend; the ground of defence being the execution of deeds like the present one. I then consulted with Mr. Justice Willes and Mr. Justice Lush, and we all agreed that these deeds were not within the act, and that leave to appear and defend ought not to be given. It is certainly not a trust deed for the benefit of creditors. It is not a composition deed, which I understand in the ordinary sense of the words to mean, a deed by which a man who is unable to pay his debts in full is empowered to pay less in satisfaction of them. Neither is it an inspectorship deed. Then, as to the words of the section itself; it is not a deed relating to the debts and liabilities of the debtor and his release therefrom, but only has for its effect to allow Lafone to go and come at his pleasure for a certain period, with freedom from suit during that time; the other words of the section have no relation to it. A deed to be within this section must, in my opinion, be a

deed by which, if carried out, the creditors will obtain some benefit; and as the words "such deed," in s. 198, mean such deed as is within the previous sections, the debtor who fails to bring his deed within their terms is not entitled to enjoy the effects of a discharge in bankruptcy, or to avail himself of the protection of the certificate.

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CHANNELL, B. I also think this rule should be discharged on the ground that this is not such a deed as is referred to by s. 198 of the Bankruptcy Act, 1861. There are two sections for our consideration, the 192nd and the 194th. The latter section has in its purview a different kind of deed from the former, and, in conformity with the opinion to which this Court inclined in the recent case of *Pearson v. Pearson* (1), I am disposed to think that a deed, not within s. 192, but registered with the formalities required for deeds under that section, is effectual to afford protection under s. 198, if it is within s. 194. If, therefore, the deed fell under either of these sections, the defendant might be entitled to relief.

With respect to the construction of s. 192, the general heading of the section must, according to the decision of the House of Lords in *Eastern Counties Railway Company v. Marriage* (2), be taken as a kind of preamble; if the words of the section clearly go beyond the preamble, they prevail, but if they are doubtful, the preamble may restrain them. Keeping, therefore, the introductory words in mind, we find s. 192 referring to two classes of deeds. The first class relates to "the debts and liabilities of the debtor and his release therefrom;" and, in my opinion, looking for the present at these words without reference to those which follow, the legislature intended that the deed so described should provide for something more than debts and liabilities, and that the words must be read as they are written, conjunctively. But as this deed contains no release, it is not within this part of the section. The second class is introduced by the disjunctive particle; the deeds described in it do not resemble this deed, and my only doubt has been, whether the defendant's argument might not prevail, that the words "or any of such matters" at the end of the second clause refer to the contents of both, so as to dispense with the necessity of

(1) Law Rep. 1 Ex. 308.

(2) 9 H. L. C. 32.

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a release in deeds under the first head. But, taking these words in connection with those immediately preceding them, which are separated from the first clause by the disjunctive particle, and are connected with one another by the conjunctive, and taking them in connection with the introductory words of the section, I cannot put upon them the construction which the defendant's case requires. The 194th section carries the matter no further, for the only additional words in that section are those which relate to the conveyance of the debtor's estate, and there is no such conveyance here; the remainder of the section, introduced by the words "or makes any arrangement or agreement with his creditors," certainly do not differ from those in s. 192 in the defendant's favour. The deed, therefore, is not within the description of the deeds to which the act relates, and I prefer putting my decision on this ground, because, looking at the view which the Courts have lately taken as to the discretionary powers of creditors, I think it better not to rely upon the unreasonableness of the deed.

PIGOTT, B. I am of the same opinion. The main object of these sections was to enable the creditors to manage their own affairs, in conformity with a widely felt and expressed desire to try that system. It was clearly intended to confer large discretionary powers on the creditors, and we ought to give every effect to that intention. I agree that if a deed is unreasonable to the extent of absurdity, we ought not to sanction it; but prudence is so much a relative matter, that it becomes very difficult to say conclusively that a deed is unreasonable on this score when the creditors have said it is reasonable; and, except in the case of inequality, we have no certain test to go by. I therefore agree with my Brother Channell, and prefer putting my judgment on the ground that, for the reasons already stated by him, this deed is neither within the preamble nor the words of the section.

Attorneys for plaintiff: *Wright & Venn.*

Attorneys for defendant: *Chester & Urquhart, for Lace & Co., Liverpool.*

BUCKLE *v.* KNOOP AND ANOTHER.

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Jan. 17.

Ship and Shipping—Charterparty—Freight, Mode of calculating—Measurement at Port of shipment or discharge—Increase of Bulk—Custom—Evidence of Custom—Notice of Custom.

By a charterparty made between the plaintiff, a shipowner, and the defendants, merchants at Manchester, it was agreed that the plaintiff's ship should sail to Bombay, and there load a cargo of cotton, and proceed with it to Liverpool, and "deliver the same" on being paid freight at the rate of "75s. per ton of 50 cubic feet delivered; the freight to be paid on right delivery of the cargo." The ship accordingly sailed to Bombay, and received a cargo of cotton which, previously to being loaded, had been subjected, in accordance with the usual practice, to a high hydraulic pressure, so as to reduce its solid contents to a minimum. On being removed from the hold at Liverpool the cotton naturally expanded very considerably, and the plaintiff claimed in this action freight on its measurement when delivered, and not when shipped. At the trial it was proved to be the custom of the Bombay trade to pay freight for cotton goods under a charterparty worded as above, on the measurement of the goods at the port of shipment. No evidence was given to shew that the plaintiff had actual notice of the custom:—

Held, first, that, apart from the custom proved, the freight was payable, on a true construction of the charterparty itself, on the measurement of the goods when shipped, and not when delivered; and secondly, that the evidence of the custom was properly admitted as not being contradictory of the terms of the charterparty.

Per Kelly, C.B., and Pigott, B., that the circumstances of the case were such as to raise a presumption that the plaintiff was aware of the custom.

Per Channell, B., that the fact of the plaintiff not having been proved to have had notice of the custom was an objection rather to the weight than to the admissibility of the evidence.

ACTION for balance of freight due from the defendants to the plaintiff under a charterparty, the terms of which, so far as they are material, were as follows: "London, 18th January, 1864. It is this day mutually agreed between T. C. Buckle [the plaintiff], owner of the ship *Gloucestershire*, and Messrs. De Jersey & Co., of Manchester, merchants [the trading name of the defendants], that the said ship shall sail to Bombay and there load from factors of the said affreighters a full cargo of cotton $\frac{\text{and}}{\text{or}}$ wool, and being so loaded shall therewith proceed to London or Liverpool as ordered, on signing bills of lading, and deliver the same in any dock freighters may appoint, on being paid freight as follows, viz. 75s. per ton of 50 cubic feet *delivered* for cotton $\frac{\text{and}}{\text{or}}$ wool. The freight to be paid [in a specified manner] on unloading and right delivery of

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the cargo. . . . The captain to sign bills of lading, if required, at any rate of freight, but at not less than the chartered freight, without prejudice to this charter."

The ship sailed to Bombay, and was there loaded with a cargo of cotton by the defendants' factors. It is the custom of the Bombay trade, in the case of charters worded like the above, as well as in other cases, before loading cotton, to measure it—for the purpose of ascertaining the space it will occupy in the hold of the ship, and the freight payable for it—in the following manner. The cotton is submitted, at as short a period before shipment as is conveniently possible, to very high hydraulic pressure, so as to reduce the space it would occupy to a minimum, and freight is payable upon the measurement thus arrived at. In this instance the cotton, after being thus compressed, occupied about six tons of 50 cubic feet each, less than the whole content of the ship. The captain was required to sign bills of lading for the cargo, in which the freight was expressed to be payable "as per margin." In the margin was the measurement of the cotton made in the manner above described. The captain at first objected to this mode of measurement, on the ground that his employer would expect to be paid under the charterparty on the measurement of the cargo as delivered and ascertained at Liverpool. Eventually he signed the bills without prejudice. When unloaded at Liverpool, the cargo, being released from the confined space of the hold, expanded very considerably—to an extent, indeed, far beyond what the ship could have contained. The shipowner was therefore entitled, if the measurement was, upon a true construction of the charterparty, to be made at Liverpool, to a large sum for freight beyond that due to him on the Bombay measurement, and which he had received. This action was brought for the difference.

The cause was tried before Lush, J., at the Liverpool summer assizes, 1866, when the above facts were proved. It was not affirmatively shewn that the plaintiff was aware of the custom in the Bombay trade to pay on the measurement at Bombay, but the charterparty was effected on his behalf by a London broker conversant with that trade. A verdict was entered for the defendants, with leave to move to enter it for the plaintiff for 140*l.* 7*s.*, on the ground that the freight was to be calculated on the measurement

of the cargo *delivered* at the port of discharge. A rule was afterwards obtained accordingly, and also for a new trial, on the ground that the evidence of usage had been improperly admitted,—first, because it contradicted the terms of the charterparty; and secondly, because it was not proved affirmatively that the plaintiff was aware of the alleged usage.

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Mellish, Q.C., and *Potter*, shewed cause. First, the word “delivered” in the charterparty has nothing to do with the time or place of measurement. It is only inserted to shew that any goods not delivered are not to be paid for. Setting aside the evidence of usage, the charterparty, when fairly construed, indicates that freight is to be paid on the cubic feet occupied by the cargo during the voyage. A shipowner is to be remunerated for the *space* occupied by the cargo. Secondly, the evidence of usage was admissible, and supports the construction which the charterparty, taken alone, would naturally bear. Thirdly, it was not necessary to prove that the plaintiff had *actual notice* of the usage. He was a shipowner, and the contract was made on his behalf by an agent conversant with the Bombay trade. The presumption therefore is, that he was aware of the usage.

James, Q.C., and *J. A. Russell*, in support of the rule. First, the construction placed on the charterparty by the defendants renders the word “delivered” superfluous and without meaning. The same word occurs twice elsewhere in the charterparty, in both cases with an unquestionable reference to the port of discharge. Why, therefore, affix a different meaning or no meaning to it in the clause specifying the mode of paying freight? In *Gibson v. Sturge* (1) the bulk of the cargo had increased during the voyage, and it was held (*Martin, B.*, dissenting) that the measurement at the port of shipment was nevertheless to decide the freight payable. But there the charterparty did not contain the word “delivered.” In *Coulthurst v. Sweet* (2) the freight was payable “*according to nett weight delivered*,” words which were assumed by the Court to mean “at the port of discharge.” *Willes, J.*, in his judgment, remarks (pp. 653-4) that these words were introduced to exclude the difficulty arising from the decision in

(1) 10 Ex. 622.

(2) Law Rep. 1 C. P. 649.

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Gibson v. Sturge. (1) Secondly, if the construction contended for is correct, the evidence of custom given was not admissible because it contradicted the words of the contract; and thirdly, even if the evidence was admissible, as not being actually contradictory, the custom cannot affect the plaintiff, because he was not proved to have been cognizant of it: *Kirchner v. Venus.* (2)

KELLY, C.B. I am of opinion that the defendants are entitled to our judgment. The first question turns upon the meaning of a clause in a charterparty entered into between the plaintiff and the defendants, for the conveyance of a cargo of cotton from Bombay to London or Liverpool, at the charterers' option, at a freight described thus: "75s. per ton of 50 cubic feet, delivered." On a true construction of this clause, and assuming that there is nothing to qualify the expression used, I think the amount of freight is to be determined by the quantity of goods as shipped at the port of loading, and not by the quantity after delivery at the port of discharge. It is contended on the other hand, and especially having regard to the recent case of *Coulthurst v. Sweet* (3), that the words used must mean that the cotton is to be measured at the time and place of delivery. But the word "delivered" appears to me to be used merely with reference to the actual quantity delivered at the port of discharge, and it may be regarded as a completion of the sentence which commences with the words "and deliver the same."

Now, as to the authorities which have been cited, the first, namely, *Gibson v. Sturge* (1), is stronger in one respect than the present case. For there the freight was held to be payable on the quantity of corn shipped, although it had increased in bulk during the voyage, and therefore the shipowner might fairly say, "I have conveyed more goods than were shipped. They have occupied a greater space, and accordingly I am entitled to a higher freight." But in this case the increase did not take place, or was not proved to have taken place, during the voyage; indeed it seems to be agreed, that the quantity when shipped was within six or seven tons of the whole content of the ship. *Gibson v. Sturge* (1), then, I consider as more than an authority in the plaintiff's favour, and we must take that case as we find it, and

(1) 10 Ex. 622.

(2) 12 Mpo. P. C. 361.

(3) Law Rep. 1 C. P. 649.

adopt the judgment of the majority of the Court, although one learned judge dissented from it. In *Coulthurst v. Sweet* (1), the freight, in order to avoid the difficulty which arose in *Gibson v. Sturge* (2), was expressed in the bills of lading to be payable at a certain rate per ton "nett weight delivered," words which lead necessarily to the conclusion that freight would be payable on the "nett weight" at the time and place of delivery. The decision proceeded upon that construction of the words used, but is not an authority for a similar construction of the words used here. And certainly, in the absence of express authority, I think it would be inequitable to ask for freight upon a greater bulk than was shipped. Upon the authority of *Gibson v. Sturge* (2), therefore, and upon principle, I am of opinion that the true construction of this clause in the charterparty is, that the quantity on which freight was payable was to be ascertained by measurement at Bombay.

Secondly, as to the evidence of custom given, I think that it was properly admitted. Where in a mercantile contract words are used capable of more than one interpretation, they must be interpreted according to the meaning which mercantile men of knowledge and experience would fix upon them. This rule sometimes has been held to prevail to an extent at first sight almost amounting to a contradiction of the expressions explained. But here the evidence of usage does no more than give effect to what I think is at any rate the natural construction of the contract. With regard to the case of *Kirchner v. Venus* (3), it only proves that people in Liverpool may well be supposed to be ignorant of rules in existence on the other side of the world, at Sydney. They are not in such a case required to know them. But here the contract is entered into between merchants of London and Liverpool, cognizant of the Bombay trade, and it relates to a subject-matter connected with London, Liverpool, and Bombay. Under these circumstances, a customary interpretation of the contract may be proved, although no proof be given affirmatively that one of the parties had heard or knew of the custom. The jury were justified, indeed bound, to presume that all the parties to the contract were cognizant of the usage which would govern it. Upon all grounds,

(1) Law Rep. 1 C. P. 649. (2) 10 Ex. 622. (3) 12 Moo. P. C. 361.

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therefore, whether with reference to the terms of the charterparty looked at alone, or to those terms as explained by evidence of usage, this rule must be discharged.

CHANNELL, B. I am of the same opinion, and have but little to add to the observations of the Lord Chief Baron. On each of the three questions submitted to us, I think the plaintiff is entitled to our judgment. Apart from usage, Mr. Mellish's construction of the charterparty seems to me to be the true one. With regard to the cases cited, I do not feel at all pressed with the decision in *Coulthurst v. Sweet* (1), because it by no means proves *Gibson v. Sturge* (2), which is an authority in the plaintiff's favour, to be wrong. Then as to the evidence of usage, I am of opinion that it was properly admitted. It was not offered to contradict, but to explain. I may add that the case of *Bottomley v. Forbes* (3) is an authority to shew that it was admissible. Then it is contended that the evidence was improperly admitted, because it was not shewn affirmatively that both parties to the contract were aware of the usage, and in support of that contention the case in the Privy Council, *Kirchner v. Venus* (4), was cited. But the objection merely amounts to this, that the evidence was inadmissible because it was incomplete for want of other evidence, shewing that the usage was known to both parties. That is an objection rather to the weight of the evidence than to its admissibility. This rule, however, was obtained only on the ground of improper reception of evidence and not either of misdirection or that the verdict was against the weight of evidence. The three points made thus reduce themselves to two. First, what is the construction to be placed on the contract itself? and secondly, was the evidence of usage inadmissible, in which case the verdict would have to be set aside and a new trial given? As to the first question, I entirely agree with the Lord Chief Baron. As to the second, I do not think that upon this rule the verdict is impeachable because some evidence was rightly admitted, which possibly may have been imperfect or incomplete. And inasmuch as I think that, upon the true construction of the contract, the evidence of usage, though admissible, was not

(1) Law Rep. 1 C. P. 649.

(3) 5 Bing. N. C. 121.

(2) 10 Ex. 622.

(4) 12 Moo. P. C. 361.

required, the imperfection or incompleteness of the evidence given could not have been a valid ground for granting a new trial, even if the rule had been obtained in another form.

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PIGOTT, B. I am of the same opinion. But I base my judgment rather upon the second ground than upon the construction of the contract apart from evidence of usage. I think that the evidence given of that usage was admissible. The case of *Bottomley v. Forbes* (1) was very similar to this, and decides the question; indeed, there is in principle no difference between them. The parol evidence in both was offered to explain, and not to contradict, the terms of the written contract.

Rule discharged.

Attorneys for plaintiff: *Clarke, Woodcock, & Ryland, for Taddy, Bristol.*

Attorneys for defendant: *Uptons, Johnson, & Upton, for Lowndes & Co., Liverpool.*

CRAGG v. TAYLOR. (2)

Jan. 26.

Debtor and Creditor—Charging Order—Charge on contingent Equitable Interest
—1 & 2 Vict. c. 110, s. 14—3 & 4 Vict. c. 82, s. 1.

The defendant, being possessed of shares in a public company, transferred them to B. as a security for a debt. Subsequently he assigned them (subject to B.'s debt) to trustees upon trust to repay a loan which had been made to him, by his brother, and to apply the surplus for the benefit, at the trustees' discretion, of his wife, his children, or himself. There were other trusts for the benefit of his wife and children, and an ultimate trust, on his wife's decease, and in case no child attained the age of twenty-one, or being a daughter married before that age, to the defendant and his assigns.

Held, that he had an "interest" in the shares capable of being charged under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.

AN ORDER, made by Byles, J., charging 150 shares in the Glynrhonwy Slate Company, with payment of the amount of the judgment recovered by the plaintiff in this action, was afterwards discharged by an order of Bramwell, B., on the ground that the defendant had, under the circumstances detailed below, no "inte-

(1) 5 Bing. N. C. 121.

(2) See also Law Rep. 1 Ex. 148.

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rest" in the shares, capable of being charged under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.

The shares were registered in the name of one Bennett, to whom the defendant had transferred them on the 24th of November, 1864, as a security for advances made by him from time to time to the defendant. On the 25th of November the defendant, in consideration of a loan of 500*l.* made to him by his brother, by deed conveyed the shares, subject to the debts secured on them, and also other property, to trustees upon trust to sell and hold the produce of the sale upon the trusts following: first, to repay the loan; secondly, to apply such part of the trust moneys, as the trustees in their absolute and uncontrolled discretion should think proper, to the maintenance, support, advancement, or otherwise for the benefit of the defendant and Sarah Mary Taylor, his wife, and of their children, or of any one or more exclusively of the aforesaid objects of this present trust, in such sums and at such times and under such restrictions and upon such conditions and generally in such manner in all respects, whether by absolute payment or by way of loan, with or without security, or otherwise howsoever, as the trustees should think fit; thirdly, without prejudice to the trusts aforesaid, and not so as in any wise to control the trustees' discretion, to pay the income arising from the trust funds to Sarah Mary Taylor for life; fourthly, after her decease to pay the fund, both capital and income, to such of the children as the parents jointly by deed or the survivor of them should by deed or will appoint, and in default of appointment to the children equally on attaining the age of twenty-one, or (if a daughter) on marriage; and, fifthly, if no child should attain the age of twenty-one or marry, to hold the fund in trust for the defendant, his executors, administrators, and assigns.

1 & 2 Vict. c. 110, s. 14, enacts that stock or shares in any public company, standing in the name of any person against whom judgment shall have been entered up in any of the superior courts "in his own right or in the name of any person in trust for him," may be charged by a judge's order with the payment of the amount of the judgment.

3 & 4 Vict. c. 82, s. 1, enacts that the provisions of the previous act shall be deemed to extend to the interest of any judg-

mènt debtor, "whether in possession, remainder or reversion, and whether vested or contingent," as well in any such stocks or shares as aforesaid as also in the dividends, interest, or annual produce of such stocks, &c.

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A rule having been obtained to set aside the order of Bramwell, B., on the ground that the defendant had an interest in the shares capable of being charged,

Jan 12. *H. T. Cole, Q.C.*, shewed cause. These shares stand in the name of Bennett, not in trust for Taylor, but (as to the balance, if any, beyond the debt due to him) in trust for the trustees of Taylor. Taylor has no interest in the shares, except what may arise in the event of his surviving his wife and of none of his children attaining the age of twenty-one or marrying. That is too remote an interest to be chargeable.

McIntyre, in support of the rule. Taylor has, unquestionably, some interest under the deed. There is not only the ultimate limitation in his favour, but also the possibility of the trustees exercising their discretion at once for his sole benefit. Then Bennett is a trustee for him to the extent of his interest, whatever that may be. He would have, no doubt, in the first instance to pay the trustees under the deed, but they would be mere conduit pipes, to pass on whatever they received to their cestui que trust. In *Baker v. Tynte* (1), it was held that a contingent life interest in stock, which had been assigned by the debtor on certain trusts with an ultimate trust in his own favour, was chargeable. The policy of the acts is to enable a creditor to charge any interest, however small.

Cur. adv. vult.

Jan. 26. The judgment of the Court (Kelly, C.B., Martin, Channell, and Pigott, BB.) was delivered by

KELLY, C.B. This is a rule to set aside an order of Bramwell, B., discharging an order of Byles, J., charging certain shares in a company with a debt due by the defendant Taylor, on the ground that the shares, which are in the name of one Bennett, are held by him in trust for Taylor; and the question

(1) 2 E. & E. 897; 29 L. J. (Q.B.) 233.

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is, whether Taylor possesses an interest in these shares which can be attached or charged under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1.

The interest in question arises under a deed which, subject to a claim of one Bennett, in respect of several sums of money advanced by him to Taylor, conveys these shares, with other property, to certain trustees in trust : First, to pay a debt due by Taylor. Secondly, to apply the trust fund to the maintenance of Taylor, his wife and children, at the discretion of the trustees. Thirdly, to pay the dividends for life to Sarah, the wife of Taylor. Fourthly, to pay over the fund, at the death of the wife, to such of the children as the husband and wife shall appoint, and in default of appointment, the fund to be equally divided among such of the children as shall attain the age of twenty-one. Fifthly, if no child shall attain the age of twenty-one, then to Taylor and his assigns.

This is a contingent interest only ; and it may be doubted whether, under 1 & 2 Vict. c. 110, s. 14, such an interest could be attached. But by 3 & 4 Vict. c. 82, s. 1, any interest of a judgment debtor, whether vested or contingent, may be charged. It is unnecessary, therefore, to rely upon the judgment of the Court of Queen's Bench in the case of *Baker v. Tynte* (1), where the general effect of both acts of parliament seems to have been fully considered ; for under the express terms of the later act—3 & 4 Vict. c. 82—a contingent interest of this nature is made chargeable. The mortgagee of the shares and the trustees under the deed may no doubt be delayed in their remedy for their own claims by the sale or other disposition of the shares, until they can obtain the authority of a court of equity. But this is an inconvenience, in many cases inevitable, in giving effect to these acts, which are imperative in their terms, and compel a court of law to order that the property shall be charged. This rule, and the original order of Byles, J., must therefore be made absolute.

Rule absolute.

Attorney for plaintiff : *George Smith.*

Attorneys for defendant : *Phelps & Bennett.*

(1) 2 E. & E. 897 ; 29 L. J. (Q.B.) 233.

[IN THE EXCHEQUER CHAMBER.]

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*Feb. 8.*NOBLE *v.* WARD AND OTHERS.

Statute of Frauds (29 Car. 2, c. 3), s. 17—*Variation of Contract—Implied Rescission—Invalid Substituted Contract.*

A contract in writing was made for the sale of goods above 10*l.* in value, to be delivered at a future time. Before the time for delivery arrived the parties made a parol agreement extending the time:—

Held, that the parol agreement, being invalid under the Statute of Frauds (29 Car. 2, c. 3), s. 17, did not effect an implied rescission of the former contract.

Moore v. Campbell (10 Ex. 323) followed.

APPEAL from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial. (1)

Holker (*Baylis* with him), for the appealing defendants. The defendants' contention is, that the contract of the 27th of September although not enforceable at law, by reason of s. 17 of the Statute of Frauds, is good to rescind the previous contract of the 18th of August. It is stated in Com. Dig. Action on the Case. Assumpsit (G), that a written contract may be discharged by parol, or impliedly by a subsequent inconsistent promise; and this rule was followed recently in *Hobson v. Cowley* (2) and *Lavery v. Turley*. (3) It is not therefore conclusive against the rescission of the contract of the 18th of August by that of the 27th of September that the latter was not in writing. In the second place, it is established by *Stead v. Dawber* (4), agreeing with *Goss v. Lord Nugent* (5), that where, by a new contract, the terms of a previous contract are varied, the old contract is rescinded, and a new contract embodying the alterations, and the unaltered part of the old one, is substituted for it; and *Marshall v. Lynn* (6), following that case, lays down that it is unnecessary to inquire whether the alteration is an essential part of the agreement. Therefore the contract of the 27th of

(1) Reported Law Rep. 1 Ex. 117, where the facts and pleadings are stated.

(2) 27 L. J. (Ex.) 205.

(3) 30 L. J. (Ex.) 49.

(4) 10 Ad. & E. 57.

(5) 5 B. & Ad. 58.

(6) 6 M. & W. 109, at p. 117.

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September, extending the time for the performance of that of the 18th of August, rescinded the former contract, and made a new contract incorporating so much of the old one as remained unaltered. If, then, it had been in writing, it is clear that the substituted contract, and that alone, would have been enforceable. But although for want of the formality required by the statute, the contract of the 27th of September could not have been enforced, yet the provision that it shall not be "allowed to be good" does not make it void altogether, and it still has the effect of rescinding the former contract.

[BLACKBURN, J. That argument amounts to this, that it is good for the purpose of rescission, though not good for any other purpose whatever.

WILLES, J., referred to *Doe d. Berkeley v. Archbishop of York* (1) and *Doe d. Biddulph v. Poole*. (2)]

This contention is supported by *French v. Patton* (3), where a contract having been altered in such a manner that it could not be sued on in its altered form (see *Hill v. Patton* (4)), it was held that the plaintiff could not sue upon it in its original form.

[BLACKBURN, J. There the original contract, which was in writing, had itself been altered on the face of it, and the case was decided on the principle of *Master v. Miller*. (5)]

The dictum in *Moore v. Campbell* (6), which is relied on by the plaintiff, was not necessary to the decision of the case, for there a new trial was necessary to ascertain whether any contract had been made by the defendant.

He also referred to *Taylor v. Hilary*. (7)

Mellish, Q.C. (*Jones, Q.C.*, with him), for the plaintiff, was not called upon.

WILLES, J. This is an appeal from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial. The action was brought for non-acceptance of goods

(1) 6 East, 86.

(2) 11 Q. B. 713.

(3) 9 East, 351.

(4) 8 East, 373.

(5) 4 T. R. 320.

(6) 10 Ex. 323; 23 L. J. (Ex.) 310.

(7) 1 C. M. & R. 741.

pursuant to a contract dated the 18th of August, by which the goods were to be delivered in a certain time. The defendants pleaded that the contract was rescinded by mutual consent. At the trial, they established that, on the 27th of September, before any breach of that contract, it was agreed between the plaintiff and the defendants that a previous contract of the 12th of August should be rescinded (as to which no question is made), that the time for delivering under the contract of the 18th should be extended for a fortnight; and other provisions were made as to taking back certain goods, which we need not further notice. The contract of the 27th of September, however, was invalid, for want of compliance with the formalities required by s. 17 of the Statute of Frauds. The defendants contended that the effect of the contract to extend the time for delivery was to rescind the contract of the 18th of August; and if the former contract had been in a legal form, so as to be binding on the parties, that contention might have been successful, so far as a change in the mode of carrying out a contract can be said to be a rescission of it; but the defendants maintained that the effect was the same, although the contract was invalid. In setting aside the nonsuit directed by the learned judge who tried the cause, the Court of Exchequer dissented from that view, and held that what took place on the 27th must be taken as an entirety, that the agreement then made could not be looked on as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. Mr. Holker has contended, that though the contract of the 27th of September cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind simpliciter, we are to say that what would have resulted if the contract had been valid, will take place though the contract is void; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended, though without expressing it, although it cannot operate as they intended and expressed. But it would be at least a question for the jury, whether the parties did intend to rescind—whether the transaction was one which could not otherwise

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operate according to their intention; and a material fact on that point is, that, while they expressly rescinded the contract of the 12th of August, they simply made a contract as to the carrying into effect that of the 18th, though in a mode different from what was at first contemplated. It is quite in accordance with the cases of *Doe d. Egremont v. Courtenay* (1) and *Doe d. Biddulph v. Poole* (2), overruling the previous decision of *Doe d. Egremont v. Forwood* (3), to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. And if direct authority were wanted to sustain this conclusion, it is supplied by *Moore v. Campbell* (4) where, upon a plea of rescission, the very point was taken by Sir Hugh Hill, who would no doubt have made it good had it been capable of being established. With reference to his argument that the contract was rescinded, Parke, B., said (5): "We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely, which the plea, we think, imports. If a new *valid* agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance, of part or all;" and he adds: "this was decided by the cases of *Stead v. Dawber* (6) and *Marshall v. Lynn*. (7)" As to the cases cited from East, too much importance has been attached to them. The first case (8) amounts to no more than this, that the Court was bound to construe the contract before it without regard to the stamp, and having done so, then to see how the Stamp Acts operated upon it. In the second case (9) it was held that, although the Stamp Acts operated to prevent the plaintiff from recovering upon the policy as altered, that circumstance could not enable him to recover upon

(1) 11 Q. B. 702.

(5) 10 Ex. at p. 332.

(2) 11 Q. B. 713.

(6) 10 Ad. & E. 57.

(3) 3 Q. B. 627; see 11 Q. B. 723.

(7) 6 M. & W. 109.

(4) 10 Ex. 323; 23 L. J. (Ex.) 310.

(8) *Hill v. Patton*, 8 East, 373.(9) *French v. Patton*, 9 East, 351.

it in its original form, when he had himself consented to the alteration of the written words.

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BLACKBURN, MELLOR, MONTAGUE SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *N., C., & C. Milne, for Slater & Heelis, Manchester.*

Attorneys for defendants: *Reed & Phelps, for Sale & Co., Manchester.*

[IN THE EXCHEQUER CHAMBER.]

 Feb. 8.

WILSON v. JONES.

Policy of Insurance—Policy on Adventure—Atlantic Cable—Insurable Interest—Wages.

The plaintiff, being a shareholder in the Atlantic Telegraph Company, caused himself to be insured with the defendant in a policy, which was a common printed form of a marine policy, filled up with interlineations and marginal additions, and which contained the following words: "At and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until it be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted each way . . . the ship, &c., goods, &c., are and shall be valued at 200*l.* on the Atlantic cable, value, say on 20 shares, at 10*l.* per share:" and also, written opposite to the clause, "touching the adventures, &c.," the words, "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from Ireland to Newfoundland, and vice versa, and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and vice versa, shall be an essential condition of the policy." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one half of the cable was saved:—

Held, first, that the policy was not on the cable, but on the plaintiff's interest in "the adventure," that is, on the profits to be derived by him from the success of the adventure; and *semble*, that the adventure was the attempt to lay the cable on that voyage.

Secondly, that such an interest was an insurable interest.

Thirdly, that the loss was a loss by the perils insured against.

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Fourthly, that, whether the adventure insured was the adventure of laying the cable on that voyage, or of laying it generally, the loss was total, inasmuch as by the breaking of the cable the probability of laying it was reduced to a mere chance, and the case was therefore within the rule making the loss of a ship total at the time of capture, although there may exist a spes recuperandi.

APPEAL from the decision of the Court of Exchequer (1), discharging a rule to set aside the verdict for the plaintiff, and to enter a verdict for the defendant.

The plaintiff, being a shareholder in the Atlantic Telegraph Company, caused himself to be insured with the defendant, in the policy now sued upon, which was the ordinary printed form of a marine policy, with interlineations and marginal additions. The material words of the policy were as follows: "Lost or not lost, at and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and vice versâ, the risk on the policy then to cease and determine, upon any kinds of goods and merchandizes, &c." (in the ordinary words of a marine policy, the *Great Eastern* being the ship named); "the said ship, &c., goods and merchandizes, &c., for so much as concerns the assured, by agreement between the assured and assurers, in the policy are and shall be valued at 200*l.* on the Atlantic cable, value, say on twenty shares, valued at 10*l.* per share."

In the margin, opposite the usual clause, "touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in the voyage, they are of the seas, &c., and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, &c., or to any part thereof," were written the words, "it is hereby understood and agreed that the policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until 100 words be transmitted from Ireland to Newfoundland, and vice versâ; and it is distinctly declared and agreed that the trans-

mission of the said 100 words from Ireland to Newfoundland, and vice versâ, shall be an essential condition of the policy." There was the usual warranty against average under 3*l.*, unless general.

The adventure having failed by the breaking of the cable whilst it was being hauled in to remedy a defect in the insulation (1), one half of the cable being saved, the plaintiff brought the present action, and obtained a verdict, subject to leave reserved to the defendant to enter a verdict for him, on the ground that the loss was not a loss by the perils insured against, or, if any, only an average loss, and that there was no evidence that it was higher than 3*l.* per cent., or to reduce the damages, on the ground that, if any loss, it was an average loss. (2)

The rule having been granted, and afterwards discharged by the Court below, the defendant appealed.

Brett, Q.C. (*Cohen* with him), for the appellant, the defendant. The first inquiry is, what is the subject matter of the policy? It is laid down in the judgment of the Court below that this is an insurance on the adventure; but to insure the success of a maritime adventure is a wager, and to make the policy good some other construction must be given to it.

[*WILLES, J.* The distinction between a wagering contract and one which is not wagering, depends upon whether the person making it has or has not an interest in the subject matter of the contract.

BLACKBURN, J. Does not this resemble an insurance on profits? Is it not an insurance of the profits to arise from the success of the adventure?]

In *Arnould Ins.* vol. i. p. 288 (2nd ed.) it is said of freight, that in order to make it an insurable interest, the assured "must be so situated with respect to it, as that he would certainly have earned freight but for the intervention of the loss;" and the same is laid down with respect to insurance on profits (p. 290). Now, there is no such certainty here. But further, in an ordinary insurance on

(1) See the judgment of *Willes, J.*, post, p. 144.

(2) After the commencement of the action, another and successful attempt

was made to lay a telegraphic wire on the same route, and the old broken line was also picked up, repaired, and laid down safely.

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profits the goods from which the profits are to arise are on board, and are subject to the risks insured against; but the profits here must arise from the shares, which were never on board or at risk, and which, according to the decision in *Paterson v. Harris* (1), could not be insured. If then the shares could not be insured, how can the profits, which are an excrescence of them, be the subject of insurance?

[WILLES, J., referred to *McSwiney v. Royal Exchange Assurance Company*. (2)]

The construction of the policy itself, which must be construed as a marine policy, shews that not the adventure but the cable was the subject matter of insurance. The words are, "on the Atlantic cable;" these words standing alone would plainly make the cable the subject matter, and their effect is not altered by those which follow, "value, say on twenty shares, at 10*l.* per share," for these words only indicate the mode in which the plaintiff's interest in the cable is arrived at. Again, in the words inserted in the margin the cable is still the subject referred to; the perils are perils "attending the conveyance and successful laying of the cable." The rest of these special words relate only to the duration of the risk, which might as well, had it been possible to calculate it, have been expressed as a specified time. Wherever, therefore, in the policy the subject matter of insurance is referred to, it is described as the cable, and the policy appears intended to secure its safety during the whole period of its manipulation in the operation of laying it down; that period being further extended till the transmission of 100 words.

[BLACKBURN, J. On that construction, if the cable were not injured, but an accident happened to the *Great Eastern*, by which the adventure were rendered impossible, the loss so caused would not be within the policy. But was it not intended to cover any such risk and danger?]

Secondly, the loss which is to be made good must be a loss caused by the perils insured against; the next question will therefore be, what were the perils included in the policy, and was this loss proved to have been caused by them? The general words

(1) 1 B. & S. 336; 30 L. J. (Q.B.) 254.
 (2) 14 Q. B. 634, 646; 18 L. J. (Q.B.) 193; 19 L. J. (Q.B.) 222.

inserted in the margin must be read in after the words of particular description, and be limited by the context. In the absence of these words, a peril causing the loss must have been shewn, being an ordinary peril of the sea; these words extend the policy to extraordinary perils of the same kind, that is, to such a peril as may happen in the most successful voyage, but to nothing farther. But in this case the weather was calm, and nothing was being done but what the parties contemplated as to be done on the most successful voyage. The cause of the loss may have been an inherent defect in the cable; but at least no proximate cause of the loss is proved, coming within the description of the perils insured against, and the case is like that of a ship going down in a perfectly calm sea.

[BLACKBURN, J. Is there any case or authority shewing that it is necessary for the insured to prove a storm, or any other definite cause of the loss? It is certainly not the usage to put him upon shewing affirmatively, that the cause of loss was an ordinary sea peril.

LUSH, J. It is for the defendant to prove the contrary affirmatively, as upon a plea of unseaworthiness.

WILLES, J. A case was tried before me on the Northern Circuit on a policy of insurance, in which it appeared that the ship left port loaded with a cargo of timber, and on the following night sank. There was no storm, nor was any cause of the loss proved. I told the jury that this was evidence on which they might well find unseaworthiness, but they found the contrary. I should have preferred a verdict for the defendant; but no suggestion was made that the loss was not a loss by perils of the sea.]

Thirdly, this is, at least, not a total loss. If the insurance is on the cable, it cannot be suggested that the loss is total. If, on the other hand, it is on the adventure, it must be admitted, and it is an argument against that construction, that the matter is so vague and indefinite as to be difficult to deal with. But, even in this case, the adventure is to be realized by means of the cable; the possession, therefore, of the cable goes far to realize the adventure, and unless the cable is totally gone, there cannot be said to be a loss of the whole adventure.

[LUSH, J. The adventure insured was the adventure of laying the cable on that occasion.

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WILLES, J. The risk is specifically limited to the loading of the cable on board the *Great Eastern*, which seems to refer to that occasion only.

BLACKBURN, J. Even assuming the insurance to be on the adventure of laying the cable generally, and not limited to that particular occasion, is not the case analogous to the case of the capture of a ship with a spes recuperandi? In such a case the loss is considered as total at the time of capture, and unless the recapture is made before action brought, or, by the American law differing in that respect from ours, even though the recapture is made before action brought, the assured is entitled to recover as for a total loss. Now here the chance of recovering from this accident had not been realized before action brought.]

Temple, Q.C. (*Leofric Temple* with him), for the plaintiff, was not called upon.

WILLES, J. This is an appeal from the decision of the Court of Exchequer discharging a rule to enter a verdict for the defendant in an action on a policy of insurance, upon the ground that the loss was not a loss by the perils insured against, and that, if it was so, it was not total, and that there was no proof of an average loss over 3*l.* per cent. Everything depends on the construction of the policy, taken in connection with the circumstances referred to in it, and especially on the construction of the written words superadded to the ordinary form. These words contain an unusual description, and also unusual provisions relating to a novel and speculative enterprise, by which a joint-stock company sought to establish for profit a telegraph across the Atlantic, and for that purpose to lay down a line of cable for 2000 miles over the bottom of the sea. It was an enterprise involving great risk and uncertainty, and the value of the shares in the company depended upon its success, and were affected by the same risk. The plaintiff had shares in the company; and it is material to observe the character of his interest depending upon his ownership of these shares. Without referring further to authority or reasoning over again what has been decided by the highest authority, it may be stated (as it has been asserted in argument), that the plaintiff had, in respect of his shares, no direct interest in the cable. As a shareholder, he had an interest in the

profits to be made by the concern, but he had none in the property of the concern itself. This was the ground on which it was decided that such an interest was not within the Statutes of Mortmain. (1) It is with reference to that state of facts, familiar to every man of business, that we must read the policy to see what has been insured, and whether it was not the interest the plaintiff had in the enterprise, that is, the advantage to arise to him from the contingency of the cable being laid down and becoming an effectual cable, which, it was assumed, it probably would be, if 100 words were transmitted each way. A further question has arisen, whether the policy referred to this particular occasion, or to any attempt to lay the cable, and though it is not necessary to decide this point, it will be proper to consider it.

The first question therefore is, what was the subject matter insured? Is this, as has been contended, an insurance on the cable, or is it an insurance of the plaintiff's interest in a share of the profits to be derived from the cable which was to be laid down? In one sense, indeed, it is an insurance on the cable; that is, it affects the cable, as an insurance on freight affects the ship. The state of the ship and freight are so connected that it is impossible that they should be dissevered, except in cases where the loss of freight is effected by the loss of the goods only, in which case it might equally be said that the insurance on freight is an insurance on the goods. But except in that sense, it will appear, when the language of the policy is examined, that the insurance is an insurance, not on the cable, but on the interest which the plaintiff had in the success of the adventure. The words in which the object insured is described are as follows: "The said ship, &c., goods and merchandize, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy are and shall be valued at 200*l.* on the Atlantic cable." If these words stood alone, they would be obviously an insufficient description of the interest which the plaintiff possessed. But they are followed by the words "value, say on twenty shares, valued at 10*l.* per share," which qualify the previous words, and are themselves followed by a context, plainly shewing that the thing

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(1) See *Myers v. Perigal*, 11 C. B. 90; 21 L. J. (C.P.) 217; 2 De G. M. & G. 599; 22 L. J. (Ch.) 431.

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insured was the value of the plaintiff's shares, or rather his interest in the profits to be derived from his shares when the cable should be laid, either on that occasion, or at some future time. In the margin the following words are written: "It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." Looking at the subject matter and at these words, and excluding any argument as to the meaning put by judicial construction on the more general words printed at the end of the policy, "touching the adventure and perils, &c., they are of the seas, &c., and all other perils, losses, and misfortunes, &c.," it is impossible to avoid arriving at the conclusion stated by Martin, B., as the opinion of the Court below, that this was an insurance on the plaintiff's interest in the adventure.

The argument addressed to us in opposition to this view at one time almost took the form of saying that such a contract would be a wager. If it is meant that it would be within the 8 & 9 Vict. c. 109, we must reject the argument, for that statute has no application to a contract upon a matter in which the parties have an interest. It relates to betting upon a mere future event, not to contracts of indemnity; which, though they may be properly classed with wagers in the scientific distribution of law, are differently dealt with in its practical administration. But it is said that the transaction is unusual, improbable, and out of the ordinary course, and that the Court ought not to support an insurance of so speculative an interest. If, however, we start with the consideration that this policy is an insurance on profits, though we admit the danger, the only conclusion will be that we ought to make ourselves quite sure that the language used has the meaning attributed to it; but we are not to be deterred from giving it effect by reason of the alleged danger. It would, indeed, be extremely dangerous to do so, when we consider that the same argument might have been urged in *McSwiney v. Royal Exchange Assurance* (1), as to the insurance of profits on goods. The plaintiff there had bought 6000 bags of rice, then lying in an Indian port, which he had sold to a merchant in London at a considerable

(1) 14 Q. B. 634, 646; 18 L. J. (Q.B.) 193; 19 L. J. (Q.B.) 222.

profit; and he insured on the profits. After part of the rice had been put on board, the vessel on which it was being loaded was driven to sea, the rice that had been shipped was spoilt, and by reason of the delay in the voyage, the residue could not be forwarded in time. It therefore became impossible to fulfil the contract, and the expected profits were lost. The defendants offered to pay the ordinary profits on the rice shipped, but resisted the claim for profits on that which was not on board. The argument was principally that those profits were not sufficiently described; and it was a subsidiary argument that the goods not loaded were never in peril within the meaning of the policy. In the Court of Queen's Bench judgment was given for the plaintiff, no one supposing that by reason of the resemblance of the contract to a wager it could not be enforced. In the Exchequer Chamber that judgment was reversed, on the ground that the words were not sufficient to describe these speculative profits, and that the loss of the rice not shipped was not a loss within the perils of the sea insured against. In delivering the judgment of the Court, Parke, B., said: "We have no doubt that the plaintiff might have recovered, in the events which have happened, for a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover the special interest from the time the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profit, not merely by the loss of all the rice by the perils of the sea, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies the special interest in profit would have been entirely defeated." And again, at the close of the judgment, he says: "According to the true construction of the policy, it attached to the profit on no goods, nor has there been a loss of profit on any goods by perils insured against, except on the 1200 bags, which has been paid for by the money paid into court. If, indeed, it attached to profit on those on shore, there has been no loss of that profit by the perils of the sea, but only a retardation of the voyage, for which the defendants are not responsible, unless the policy especially provided for such an event." The present policy is evidently framed with skill and under good advice, and was, doubtless, drawn with a reference to

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the case I have just referred to. I am the more fortified in this conclusion as to what is the subject matter insured, from the difficulty of suggesting any other construction of the policy, except that it is an insurance on the cable, which, for the reasons before mentioned, is not a rational construction.

The insurance, then, was on the adventure, but what was the extent and duration of that adventure? I will here refer to the language describing the duration of the risk. The policy is to cover every risk attending the laying of the cable, "from and including its loading on board the *Great Eastern*, until 100 words be transmitted from Ireland to Newfoundland, and vice versâ; and it is distinctly declared and agreed that the transmission of the said 100 words from Ireland to Newfoundland, and vice versâ, shall be an essential condition of the policy." The true conclusion to be drawn from these words, and especially from the concluding ones, is either that the insurance was on the adventure limited to the endeavour to lay the cable on that occasion; or, if not, it must at least be imputed to the parties that they supposed, unless the result were then arrived at, that there would be an end of the matter.

The second question is, whether this is a loss by the perils insured against. If the insurance were limited to the printed language in an ordinary policy, it would be necessary to do that in which we should have little authority to guide us, namely, to put a construction on the words ordinarily occurring at the end of the clause enumerating the risks insured against: "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods, and merchandizes, and ship, &c., or any part thereof." But this is unnecessary; for, on reading the marginal words, which provide that the policy "shall cover every risk and contingency attending the conveyance and successful laying of the cable," those words being introduced by the words "in addition to the ordinary perils," it appears that the parties have decided this question for themselves; and that this being a risk and contingency attending the successful laying of the cable, it is within the policy, unless the facts shew that the loss was caused by a peril only to be attributed to an inherent vice of the cable itself, or to some other implied exception

to the perils included in the policy. This brings me to the statement of what actually happened, which is as follows:—After stating that the ship started with the cable on board, the case goes on to say: “On the morning of the 2nd of August, when from 1100 to 1200 miles of the cable had been laid down, it was discovered that the electric current did not pass. A portion of the cable was then hauled back into the ship; while this was being done, the cable parted on board ship inside the bows, and the broken end fell into the sea. The weather which prevailed at and about the time of the parting of the cable was described in the ship’s logs and proved in evidence, to have been as follows:—‘Light westerly airs, and fine clear weather.’” Then follows a statement of the attempts that were made to recover the cable. No averment of mala fides is made, or probably could be; nor is it stated that the accident was due to any inherent vice of the cable; therefore we have it that in the course of laying down the cable it became necessary to haul it in, that in hauling it in a portion broke, that those in charge of the business were or may have been under a necessity of hauling it in, and that this breaking of a portion caused the failure of the whole adventure, if considered as the adventure of laying the cable on that voyage. We are not called on to pronounce any judgment upon the facts. The only question made at the trial was, whether there was any evidence to go to the jury of a loss by the perils insured against. Having read the language of the policy, I will only say, that on these facts it is impossible to come to the conclusion that there was no evidence on which the jury might find that the loss was a loss by perils insured against.

Thirdly, assuming that there was a loss of the subject matter of the insurance by the perils insured against, was there a total loss? It was probably rightly agreed, that if the insurance was on the cable, there was no total loss; but it is not necessary to examine this, because our construction of the policy is, that it was not the cable, but the plaintiff’s interest in the adventure which was the subject of insurance. If, then, we consider the adventure as limited to that one attempt, or if what was insured was the profit to be made by successfully laying down the cable on that occasion, there is clearly a total loss; if, on the other hand, what was

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insured was the whole adventure in which the plaintiff was interested, and which was intended to be realized in that attempt, then by the defeat of that attempt there was a total loss, on the same principle on which a vessel is totally lost to the insured by capture by the enemy, although the presence of ships of war of its own nation makes it more probable that it will be recaptured, than that it will be taken into a hostile port. It is a total loss at the time. However subsequent events might affect the result, the loss was presumably and conventionally total at the period when it occurred. I will therefore conclude by saying, that this was an insurance on the plaintiff's interest to the extent of 200*l.*, in an adventure which consisted in laying down the Electric Telegraph Cable in such a condition as to transmit a message, either on that particular trial by the *Great Eastern*, or if not on that particular trial, then in the adventure generally. The former opinion is, I think, right; but, taking into consideration the nature of the subject matter, it was in any case totally lost by the loss of all chance of laying the cable on that voyage. The judgment must therefore be affirmed.

BLACKBURN, J. I am of the same opinion. I agree in all that my Brother Willes has said, and will only add a few words. As to the argument, that this policy would on the plaintiff's construction be a wager, I apprehend that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to; and I know no better definition of an interest in an event than that indicated by Lawrence, J., in *Barclay v. Cousins* (1), and more fully stated by him in *Lucena v. Craufurd* (2), that if the

(1) 2 East, 544.

(2) 2 B. & P. N. R. at p. 301: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of

the contract of insurance, it follows that it is applicable to protect men against uncertain events, which may in anywise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have intercepted from them the advantage or

event happens the party will gain an advantage, if it is frustrated he will suffer a loss. Now we must see whether the plaintiff was in this position. He was interested in a company which was about to lay down a cable across the Atlantic. If that event happened, there can be no doubt the owner of shares in the company would be better off; if it did not happen, there can be no doubt his position would be worse. It follows, then, equally without doubt, that if by proper words the parties have entered into a contract of insurance for that interest, the policy is good. Now, if they had stopped at the word cable, the plaintiff's interest would not have been correctly or sufficiently described, according to the principle of the case of *McSwiney v. Royal Exchange Assurance Company*. (1) Neither if they had said that it was the cable as shipped on board the *Great Eastern*, would it have been a sufficient description. But here they have used words as to which I will only say, that no one who looks at them fairly, and reads them in connection with the circumstances, can fail to see that the intention of the parties would be frustrated by such a construction as is contended for by the defendant. Then, as to the question whether the loss is within the perils insured against, were those perils only the ordinary perils? or was it intended by the words "in addition to the ordinary perils, &c.," to include all dangers occurring in the course

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profit, which, but for such events, they would acquire, according to the ordinary and probable course of things;" at p. 302: "Where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it, as to have benefit from its existence, prejudice from its destruction."

At p. 301, after saying, that "where, from the variety of probable contingencies (which, independent of the specified risks, may prevent the assured from deriving any benefit from the sub-

ject matter insured) it is impossible to weigh the probability of its being intercepted by such risks, an interest so uncertain may not be the subject of surance;" the learned judge adds, "And so Lord C.J. Willes, in *Fitzgerald v. Pole* (Willes, 648), considered it; where, to shew that in that case the insurance must be on the ship, and not on the voyage, he relied on the impossibility of such contingency as the loss of the voyage being valued; so that, according to him, the impossibility of valuing, and not the want of property, was the reason why that voyage could not be the subject matter of this contract."

(1) 14 Q. B. 634, 646; 18 L. J. (Q.B.) 193; 19 L. J. (Q.B.) 222.

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of laying the cable which might interrupt the enterprise, and so frustrate the profits which the plaintiff hoped to derive from its success? It cannot be doubted that the plaintiff meant to stipulate for an indemnity against any injury to his interest by dangers so occurring; the cable was, in fact, broken in an attempt to haul it in in the course of laying it; it is therefore impossible, if any sense is to be given to words used, not to say that what has happened was within the risk and contingency insured against. Lastly, I am clearly of opinion that the interest insured was the plaintiff's interest in the laying of the cable on that particular voyage. But if it be otherwise, and the interest was an interest in the cable being laid at any time, there was still a total loss; for although there was some chance of the cable being recovered, it was a mere chance; and the same difficulty would have to be encountered on any future attempt to recover it, that had baffled the efforts of those engaged on the present occasion. The loss then was total; and if there was anything to abandon, the underwriters were entitled to the benefit of it. But though it was not necessary to decide the point, the insurance was in my opinion for that voyage, and there was therefore nothing to abandon. The judgment of the Court below must be affirmed.

MELLOR, J., concurred.

MONTAGUE SMITH, J. I concur; and I only wish to add that I think the insurance was on this particular voyage.

LUSH, J., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Norris & Allen, for Simpson & North, Liverpool.*

Attorneys for defendant: *Marshall, Westall, & Roberts, for Lace & Co., Liverpool.*

MABER v. MABER, EXECUTRIX.

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Feb. 9.

*Statute of Limitations (21 Jac. 1, c. 16), s. 3—Acknowledgment—Payment—
Transaction where no Money actually passes.*

To constitute a payment of interest sufficient to take a debt out of the operation of the Statute of Limitations, it is not essential that money should actually pass between the debtor and creditor.

After a debt due to the plaintiff from his son had been barred by the statute, the plaintiff, his son, and his son's wife, had an interview at which the interest due was calculated. The plaintiff's son then put his hand into his pocket, as if to get out the money to pay it. The plaintiff stopped him, and writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties :—

Held (by Martin, Channell, and Pigott, BB.; Bramwell, B., dissenting), that this transaction was a sufficient payment to take the debt out of the Statute of Limitations.

DECLARATION against the defendant, as executrix of George Mabier the younger, for money lent, and on accounts stated.

Third plea, that the cause of action did not accrue within six years before this suit. Issue thereon.

At the trial before Bramwell, B., at the sittings in Middlesex, in Hilary Term last, it appeared that the plaintiff had, on the 9th of June, 1857, lent George Mabier, jun., his son (the defendant's testator), 80*l.*, for which his son then gave a promissory note, payable on demand. The son soon after went to Australia, and no payment on account of either principal or interest was made during six years, but in August, 1864, the son having returned to England, a transaction took place at the plaintiff's house, which was relied on by him as sufficient to take the case out of the Statute of Limitations. (1) On that occasion the plaintiff, his son, and his son's wife (the defendant) met, and an interview took place, of which the defendant and plaintiff gave a different account. The judge left it to the jury to say which of the two they believed, and they found that the plaintiff's version was the true one. According to his evidence, an account of the interest due was made out, and the son put his hand into his pocket, as if to pay the money. The plaintiff then said, "Stop a bit;" and before any money was

(1) 21 Jac. 1, c. 16, s. 3.

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actually produced, wrote out a receipt in the following form:—
 “1864, Aug. 26. Received of Mr. G. Maber, jun., 28*l.*, being seven years’ interest due on 80*l.*, due June 28, 1864. (Signed) G. Maber.” He then remarked that he had been told that he had never before made his son’s wife a present, and turning to her, added, “I shall make you a present of this money. See you take care of the receipt; it may be useful to you with my executors.” An indorsement was made on the promissory note that the interest was paid. No money, however, actually passed between the parties, either at that or any subsequent time.

A verdict was entered for the plaintiff, with leave to move to enter it for the defendant, on the ground that no payment of interest or principal had been made so as to take the case out of the Statute of Limitations.

A rule nisi having been obtained accordingly,

Feb. 8. *McIntyre* shewed cause, and contended that there had been a payment. It was not necessary that money should actually pass. Here it would have been given to the plaintiff, but for his own interposition. If he had received it, he would have immediately handed it to his son’s wife. To have given the money therefore, would have been an unnecessary ceremony. In law, however, it must be treated as having been given and returned: *Ashby v. James* (1); *Amos v. Smith*. (2)

Henry James, in support of the rule, contended that to treat the transaction as a payment would be to render the statute nugatory. Payment must mean actual payment. Where a man waived his right to be paid, he could not afterwards insist that he had been paid.

Cur. adv. vult.

Feb. 9. The Court differing in opinion, the following judgments were delivered:

MARTIN, B. This was a rule obtained to enter a nonsuit in a case tried before my Brother Bramwell, and the question arises upon it whether or not a certain transaction then proved takes a debt out of the operation of the Statute of Limitations. The

(1) 11 M. & W. 542.

(2) 1 H. & C. 238; 31 L. J. (Ex.) 423.

action was brought against the executrix of the plaintiff's son for some money which the plaintiff had lent to his son, who had afterwards gone to Australia. Upon his return from Australia the parties met, and the son stated he was prepared to pay the interest upon the loan. He intimated that he had the money, and the jury have found that he was then and there ready to pay it. Upon this the plaintiff observed to his son's wife, who was present, that she had said he had never made her a present, and that he would make her a present with this interest. A receipt was thereupon given for the interest, and an indorsement made upon the promissory note which had been given for the loan, that the interest was paid. The question is, whether this transaction takes the case out of the Statute of Limitations. I am of opinion that it does. By Lord Tenterden's Act (1) it is provided that, in actions of debt, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed to be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Statute of Limitations (2), unless such acknowledgment or promise shall be made in writing, signed by the party chargeable thereby; and there is a proviso that nothing therein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever. This question of payment of principal and interest, therefore, is left to what may be said to be the common law, and any transaction which would have amounted to a payment of principal or interest in the interval between the original Statute of Limitations and the passing of Lord Tenterden's Act continues to have the same effect. I have had occasion twice to give a judgment upon this matter; first, in the case of *Bodger v. Arch* (3), and secondly, in the case of *Amos v. Smith* (4); and in both cases I stated that, in my judgment, any facts which would prove a plea of payment of interest in an action brought to recover it, would be a payment sufficient to bar the statute. The case of *Amos v. Smith* (4) was stronger than this, because there was there no intention of actually paying the interest, but the jury have here found that the debtor was ready and willing to pay it; and in

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(1) 9 Geo. 4, c. 14, s. 1.

(3) 10 Ex. 333.

(2) 21 Jac. 1, c. 16, s. 3.

(4) 1 H. & C. 238; 31 L. J. (Ex.) 423.

1867 : my judgment, when a man comes prepared to pay a debt, and has the money, in point of fact, in his hand to pay, but the creditor thinks fit to say, "Do not pay me, I give you that money, and I consider it as having been paid," at the same time handing the debtor a receipt for the money, and making an indorsement of payment upon the security—that is a payment. There is no necessity for the debtor to go through the form of taking the money out of his pocket and giving it to the creditor, and the creditor returning it to him. If the jury have found the real transaction to be as I have stated it, all that prevented actual payment being, that it was thought unnecessary to go through the idle ceremony of one party taking the money out, and the other handing it back again, that was equivalent to payment.

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I may add that this decision steers clear of the cases about an agreement or promise to pay; for I do not rely on any other matter but the state of facts found by the jury, which would have supported a plea of payment if an action had been brought for the interest, and which, therefore, in my judgment, constitutes a payment to take the case out of the Statute of Limitations. The rule must accordingly be discharged. I am authorized to state that my Brother Pigott concurs in the view I have expressed.

BRAMWELL, B. I think this rule ought to be made absolute, This case is as it would have been if Lord Tenterden's Act (1) had never passed: and I quite agree that if the evidence given would have supported the plea of payment, then there is a sufficient payment of the interest to take the case out of the Statute of Limitations. My Brother Martin has correctly stated the facts, except that the jury did not find positively that the deceased had the money in his pocket, but only that he put his hand towards his pocket, and said he was ready to pay. From that finding, however, we may well infer that he had the money there. But to my mind this evidence would not support the plea of payment. If there had been any alteration in the legal rights of the parties, it might have done so, for I do not say it is absolutely necessary that the money should actually pass. If the plaintiff had said, for example, to the deceased man, "Do not pay me, but pay your

wife," and the deceased man had paid his own wife, and given her the money, or if the plaintiff had said, "Do not pay me but undertake to pay somebody else to whom I owe the money," then there would have been an alteration in the legal position of the parties. But nothing of the sort was proved here. The case was no better than if the plaintiff had said, "Keep the money yourself." And I say this not merely because the money was directed to be given to the wife of the deceased; for if the direction had been to give it to any third person, that person could never have enforced payment of the money from the deceased, because there would have been no consideration moving from him, and therefore, in truth, it would have been nudum pactum as far as any promise or undertaking on the part of the deceased was concerned. In short, to my mind, the contention on the part of the plaintiff is this: To say to a man, "You need not pay me, but I will consider you have," is equivalent to payment; or—to put it in another form—to say, "I will not call upon you to pay, but I will give you a receipt as though you have paid me," is a payment. I cannot concur in that proposition, and therefore I think the rule ought to be made absolute.

CHANNELL, B. My mind has not been entirely free from doubt during the discussion of this case, but on the whole I agree in the conclusion, at which my Brother Martin has arrived, that this rule should be discharged. The question strictly is one of law, and we are all agreed that the answer to an inquiry, whether the facts would have supported a plea of payment, is the test of whether they take the case out of the statute. Now, I think, with regard to the way in which the matter was put by my Brother Bramwell, there may be some doubt whether a mere receipt given for the interest of a debt separated from the principal would be sufficient to prove a plea of payment in an action brought for that interest. But the facts in this case went to the jury, who found the plaintiff's version of them to be true. Therefore, we may consider the case as if it depended upon the plaintiff's evidence only; and then I think we are authorized to infer that the jury have found there was a payment so far as it was for them to find it; that is, they found the facts from which we are to consider whether payment, in

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strictness of law, was made. We may take it that the money was in the pocket of the deceased. He was willing to produce it, and a receipt was given by the plaintiff, in the presence of the wife of the deceased, and an indorsement made upon the note. I think, altogether, that would be enough to justify us in coming to the conclusion upon a plea of payment, that it was proved; and there is therefore sufficient to take the case out of the Statute of Limitations, though no money actually passed.

Rule discharged.

Attorneys for plaintiff: *Dangerfield & Fraser.*

Attorney for defendant: *George A. James.*

June 8.

D'ARCY v. THE TAMAR, KIT HILL, AND CALLINGTON
 RAILWAY COMPANY.

Directors—Company—Bond under Company's Seal—Unauthorized Bond—Construction—Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16.)

Directors exercising the powers conferred by the Companies Clauses Consolidation Act, 1845, must act together, and as a board.

The prescribed quorum of directors in the defendants' company being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority. The company being sued upon this bond:—

Held, that the seal of the company was affixed without lawful authority, and that the company were therefore not liable on the bond.

ACTION on a bond for 2000*l.*, dated the 29th of September, 1864, given under the seal of the defendants to the plaintiff, and conditioned for the payment, with interest, on the 29th of September, 1866, of 1000*l.*, recited to be due to the plaintiff from the defendants for work and labour. (1)

Plea, non est factum. Issue thereon.

The cause was tried before Martin, B., at the sittings after Easter Term, 1866.

It was proved that the seal of the defendants' company was affixed by the secretary (who also countersigned the bond), and it

(1) The plaintiff was the defendants' behalf of one Hall, to whom he had engineer; he sued in this action on assigned the bond.

was admitted that the secretary was the proper person to affix the seal, provided he were duly authorized, but it was contended for the defendants that he was not so authorized.

The secretary gave evidence that he was authorized by three directors to affix the seal, but, on cross-examination, admitted that the assent of two out of the three had been obtained at a private interview at the house of one of them, where the two signed a letter authorizing the issue of the bond, and that, on meeting the third in the street, he had then obtained his assent and his promise to sign the letter. The signature of the third, however, was not obtained until after the issuing of the bond. It further appeared that, when the bond was given, there were more than three directors, and it was not shewn that any committee had been appointed under 8 Vict. c. 16, s. 95.

The Companies Clauses Act, 1845 (8 Vict. c. 16), which is incorporated in the defendants' special act, provides (s. 90), that "the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special act to be transacted by a general meeting of the company, but all the powers so to be exercised shall be exercised in accordance with, and subject to, the provisions of this and the special act," and subject also to the control of general meetings. It also provides (s. 92) that the directors "shall hold meetings at such times as they shall appoint for that purpose;" that "in order to constitute a meeting there shall be present at least the prescribed quorum;" and "that all questions shall be determined by the majority of votes of the directors present;" ss. 95 and 96 provide for the appointment of committees, with the power of doing any acts which the directors might do.

By s. 97, "the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may be lawfully exercised as follows: that is to say, with respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company."

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The defendants' special act (27 & 28 Vict. c. ccxciv.) s. 24, provided that the number of directors should be, until the first general meeting of the company, eleven, and afterwards should not exceed six, nor be less than three; "and the quorum of a meeting of directors shall be three, unless the number of directors is reduced to three, and then, until the number is raised, the quorum shall be two."

A verdict was found for the plaintiff for 1081*l.*, leave being reserved to the defendants to move to enter a verdict for them, or a nonsuit, on the ground that the seal was affixed without lawful authority. A rule having been obtained accordingly,

Patchett and *Thesiger* shewed cause. The bond bearing the company's seal is *primâ facie* the company's bond, and it lies upon them to disprove it. It is not denied that the seal was affixed by the proper person, and it must therefore be assumed against the company that all the necessary formalities were complied with, and strict proof of the contrary must be given: *Clarke v. Imperial Gas Light Company*. (1) But further, the secretary swears that he was authorized by three directors to affix the seal, and it appears that in fact he was so. In answer to this, the defendants contend that the directors had no authority, because they were not acting together. But this is not shewn to be necessary; or, if it were so, yet any state of facts not absolutely excluded by the evidence might be assumed in support of a due exercise of authority. The bond, then, being formally regular, the defendants are bound to shew that its issue was inconsistent with the statutes under which they acted: *Hill v. Manchester and Salford Waterworks Company*. (2) But it is not contended that the directors had not power to issue the bond, which was given for the payment of a debt due for work done for the company, and is clearly within their ordinary powers. Were it, however, in respect of the mode of issuing it or otherwise in excess of their authority, yet the company would have no defence against the plaintiff, who was without notice of the irregularity: *Royal British Bank v. Turquand* (3); *Agar v. Athenæum Life Assurance Society*. (4) Lastly, whatever objection

(1) 4 B. & Ad. 315.

(2) 2 B. & Ad. 544.

(3) 5 E. & B. 248; 6 E. & B. 327;

24 L. J. (Q.B.) 327; 25 L. J. (Q.B.) 317.

(4) 3 C. B. (N.S.) 725; 27 L. J. (C.P.) 95.

of this kind can be taken to the deed, it ought to be specially pleaded, and cannot be proved under non est factum.

[BRAMWELL, B., referred to *Bank of Ireland v. Evans' Trustees* (1) and asked whether, if the seal had been affixed by the secretary without any colour of authority, it could be contended that the plaintiff could recover.]

It must be admitted he could not. They also referred to *Laird v. Birkenhead Railway Company* (2) and *Lowe v. London and North Western Railway*. (3)

Montagu Chambers, Q.C., and *Paterson*, in support of the rule, were stopped.

MARTIN, B. We are all of opinion that the allegation that this is the bond of the company is disproved. The Companies Clauses Consolidation Act, 1845 (which is incorporated with the defendants' special act), enacts (ss. 90, 91), that, with the exception of certain specified matters reserved to the general meetings, the business of the company shall be conducted by the directors; and s. 92 and the following sections point out the mode in which they are to conduct it. They are to hold meetings, at which the prescribed quorum must be present, and questions at such meetings are to be determined by a majority of votes. The quorum prescribed by s. 24 of the special act was here three, for it is in evidence that, when this bond was given, there were more than three directors. No special resolution of the company is shewn authorizing the issue of this bond, and it does not appear that any committee has been appointed under s. 95 of the general act. The bond, therefore, must, by s. 97, have been made by the directors, acting in the manner pointed out by the previous sections. The question then is, whether the company's seal was affixed to the bond by the authority of the directors so acting, for the secretary had no authority to affix it unless he was authorized by them. Now it is not necessary that there should be any fixed place of meeting, but it is quite clear that the directors are to act together, and in a meeting,

(1) 5 H. L. C. 389; 4 Irish Com. Law Rep. 624.

(2) John. 500; 29 L. J. (Ch.) 218.

(3) 18 Q. B. 632; 21 L. J. (Q.B.) 361. An attempt was also made at the

trial, and on the argument, to connect the bond sued on with some resolutions passed by a special meeting of the company but was unsuccessful.

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whereas the authority on which the secretary acted was given by two only acting together, and by the subsequent assent of a third. The authority, therefore, was not of such a character as enabled the secretary to affix the seal so as to bind the company.

BRAMWELL, B. I am of the same opinion. It is not to be presumed that what has been done is *ultra vires*, and therefore when an instrument is produced under the seal of the company, it is *primâ facie* to be taken that the seal was properly affixed. But it is here shewn affirmatively that the seal was not properly affixed; for this could not be done, except by the authority of such a number of directors as had power to act for the company, acting jointly and as a board. This is clearly the intention of the act; and it is an obvious consideration that, if it were otherwise, a quorum of directors might meet at one place with power to act for the company, and another quorum might, at the same time, meet at another place, with equal power and come to an opposite determination. But it is manifest that the seal was affixed without the authority of the directors meeting as a board, and the bond is therefore void. If it is not contended that the affixing of the seal by the secretary without any colour of authority would bind the company, then it follows that, although, if you do not examine into the authority, the bond under the company's seal is *primâ facie* good, yet when the inquiry is made, and the want of authority is disclosed, the company cannot be bound. The plaintiff suffers no injury by this decision, for the debt for which the bond was given remains as good as before.

CHANNELL, B. I also think this rule must be made absolute. On the production of the bond under the corporate seal it is *primâ facie* to be assumed that it is valid; the defendants must shew that the necessary authority was not given; and I have no doubt that it is open to them to shew this under the plea, *non est factum*. They have accepted this onus of proof, and I think that they have satisfied it; for it appears that there were more than three directors, and that the authority was never given by a quorum of three. Without saying that the board are bound to meet at any particular place, yet when an authority is given to a less number to bind the whole body, they must meet in some place where all may be pre-

sent, and may have the opportunity of expressing their assent or dissent. There is nothing to warrant us in assuming that the authority was given by these persons as a meeting of directors, and the seal was therefore not affixed by the secretary in such a way as to bind the company.

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PIGOTT, B. I am of the same opinion. No doubt this is the deed of the company if it is the deed of the directors properly done; the question is, whether it is so done. The special act (s. 24) makes "the quorum of a *meeting* of directors" three, and the general act speaks also of meetings of directors. Three directors have given their assent to the issuing of this bond, but were they a meeting? Clearly they were not; but, on the contrary, the secretary casually picked up three members of the body of directors, and obtained their assents separately. The seal has been affixed without the authority of a meeting of directors, and the bond is therefore invalid.

Rule absolute.

Attorney for plaintiff: *R. Warren.*

Attorney for defendants: *J. Gurney.*

FORSTER v. MACKRETH.

Feb. 12.

*Attorney—Partnership—Power to draw Cheques—Post-dated Cheque—
Bill of Exchange.*

A member of a firm of attorneys has no implied authority to bind his co-partners by a post-dated cheque, drawn in the name of the firm.

Quære, as to the effect of the revenue laws upon post-dated cheques.

THE plaintiff sued the defendant, in his first count, as holder of a bill of exchange for 18*l.*, drawn on one J. Dickenson, and indorsed by the defendant to the plaintiff, and dishonoured; in his second count, as bearer of the defendant's cheque for 90*l.*, dated the 20th of July, 1865, drawn by the defendant on the Imperial Bank, Limited, in favour of J. S. or bearer, and delivered to the plaintiff, and dishonoured.

To these counts respectively the defendant pleaded (amongst other pleas) denial of the indorsement, and denial of the making;

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and also special pleas, alleging respectively that the defendant did not indorse or make the bill and cheque respectively, except by one W. O. J. Tucker in the name of a firm in which Tucker and the defendant were partners, and by virtue of Tucker's authority as such partner, and that Tucker indorsed and made the bill and cheque fraudulently, and without the consent or authority of the defendant, and not on account of any of the purposes of the partnership, nor in respect of any claim or demand on the partnership, and alleging notice.

On these pleas the plaintiff joined issue.

At the trial before Martin, B., in Michaelmas Term, 1866, the plaintiff's evidence was, that the defendant and Tucker were in partnership as attorneys; that on the 27th of July, 1865, the plaintiff, at Tucker's request, discounted for the firm the bill sued upon; that on the 13th of July Tucker asked the plaintiff to advance him 80*l.* for a client of the firm, and that he accordingly gave him a cheque for that sum (which was afterwards duly paid), and at the same time received in return the cheque of the firm sued upon (90*l.*), drawn by Tucker, and dated the 20th of July. He further stated that such transactions were in the common course of business between himself and the firm; but it did not appear that the defendant had been cognizant of any such transaction, and the defendant denied that he ever gave authority to Tucker to draw or indorse bills in the name of the firm, or that he had any knowledge of the transaction in question. The defendant admitted, however, that each partner was accustomed to draw cheques in the name of the firm in the ordinary way.

The learned baron, on this evidence, ruled, that the defendant was not liable for the bill, but was so for the cheque; but he directed a verdict for the amount of both, giving the defendant leave to move to enter a nonsuit, or a verdict for him. A rule having been obtained accordingly,

Jan. 31. *Gates* shewed cause. Although ordinarily a partner in a firm of attorneys cannot, according to *Hedley v. Bainbridge* (1), bind his partner by a promissory note or a bill of exchange, yet such partners have ordinarily power to draw cheques in the name

of the firm, and the holder of such a cheque is not called upon to inquire whether it is or is not post-dated.

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[KELLY, C.B. If it is admitted that a partner has power to bind the firm by a post-dated cheque, which has the same effect as a bill of exchange at so many days date, is not it vain to say that he has no authority to bind by a bill of exchange?]

The date of the cheque did not destroy its character as a cheque, and if presented at once, the banker must have paid it. (1)

Hayes, Serjt., and J. M. Howard, shewed cause. A bill of exchange and a post-dated cheque are in substance the same. A true cheque being payable on demand implies that there are assets to meet it, and only pledges the credit of the drawer as a secondary consequence; but a post-dated cheque implies the contrary; the banker could not charge his customer with the amount if he paid it before the day, nor is it intended by the parties that it shall be available till the day arrives. It is therefore like a bill of exchange or a promissory note, only an engagement that at the day named there shall be funds to meet it, and it is merely a device for raising money upon the faith of that engagement. The only power of drawing cheques to be implied from a partnership between attorneys, or from the practice proved here, is such as might be expressed in a deed of partnership by saying, that each of the partners shall have power to draw lawful cheques in the name of the firm in the usual and ordinary manner.

[CHANNEIL, B. The question may be put thus: An attorney has not ordinarily power to bind his partner by his acceptance, but he may by usage have that power. Where such a power exists, it is assumed to exist for all purposes, and its exercise binds unless it is shewn that the authority was limited, and was known to be so, or the transaction is accompanied by fraud. If, then, the liability on cheques and on bills of exchange is governed on this point by the same rule, wherever the authority to draw cheques exists (as here), any cheque drawn by a partner is *primâ facie* good.

(1) The question of whether a post-dated cheque was valid was also argued, and 31 Geo. 3, c. 23; 55 Geo. 3, c. 184; and 21 & 22 Vict. c. 20; and the cases of *Austin v. Bunyard*, 34 L. J. (Q.B)

217, and *Allen v. Keeves*, 1 East, 435, were referred to; but as the judgment of the Court proceeded entirely on the other point, those arguments are not reported.

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Then, assuming the drawing of post-dated cheques to be irregular, does the fact of a cheque being post-dated intimate that the partner drawing it is acting in excess or contravention of his authority or contract ?]

It does. He cited *Hasleham v. Young* (1); and *Yates v. Dalton*. (2)

Cur. adv. vult.

Feb. 12. The judgment of the Court (Kelly, C.B., Martin, Channell, and Pigott, BB.) was delivered by

MARTIN, B. In this action the defendant was sued upon a bill and a cheque, the one indorsed, the other drawn, by his partner in the name of the firm. It is clear that no action can be maintained upon the bill, because there is no authority in one member of a firm of attorneys to bind the rest by drawing or indorsing bills in the name of the firm. With respect, however, to the cheque, the case is different. There was abundant evidence that both parties had authority to draw cheques in the name of the firm, as occasion required. But in the present instance the facts were peculiar. The cheque was post-dated, being dated seven days later than the time when it was actually delivered; it was brought to the plaintiff by Tucker, the partner of the defendant, and, being a cheque for 90*l.*, it was exchanged for the plaintiff's cheque for 80*l.* It was stated by the partner who brought it, that he desired to raise money for the purposes of the firm; and, so far as we can see, there is no ground to impute fraud to the plaintiff, who stated that such transactions were common between himself and that partner, purporting to act on behalf of the firm. It was contended by my Brother Hayes at the trial, and upon the argument of this rule, that in point of fact it was the same thing as if Tucker had given a bill for the same amount at seven days' date, the intention of both parties being that the cheque should be held over until the day of the date arrived. We have considered the case a great deal, and much doubt has existed upon the point in my own mind, and in the minds of other members of the Court; but we are all of opinion that we cannot in substance distinguish this cheque from a bill of exchange at seven days' date. This being so,

(1) 5 Q. B. 833.

(2) 28 L. J. (Ex.) 69.

without entering into the further question which was argued as to the operation of the revenue laws upon post-dated cheques, we are of opinion that the defendant is not bound by the transaction, and he is therefore entitled to have the rule made absolute to enter a verdict for him.

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KELLY, C.B. I will only add that this case involves a question of the gravest importance, not only to attorneys in partnership, but to all copartnerships in which the members of the firm possess only a limited authority to bind the firm by their drafts, and to all persons dealing with the members of such copartnerships. For the purposes of our decision it is only necessary to hold that, so far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days date as intervene between the day of delivering the cheque and the date marked upon the cheque.

Rule absolute.

Attorney for plaintiff: *J. M. Maddox.*

Attorneys for defendant: *Rooks & Co.*

ANTHONY v. THE BRECON MARKETS COMPANY.

Jan. 24.

Construction—Slaughter House—Towns Improvement Clauses Act, 1847
(10 & 11 Vict. c. 34), s. 126.

By the Towns Improvement Clauses Act, 1847, s. 126, no new slaughter house is to be used in places to which the act applies, without the licence of the "commissioners." By s. 45 of the Local Government Act, 1858 (which is by s. 5 to take effect in all places where the Public Health Act, 1848, has been adopted), the above clause is incorporated, and by s. 7 the local board is, for the purposes of the clause, to be deemed the "commissioners."

In Brecon, the Public Health Act, 1848, was adopted, and by s. 12 of that act the corporation was the local board.

By a private act (1 Vict. c. xii.) the corporation were empowered to carry out certain public works (including the erection of slaughter houses), and for that purpose to borrow money and to buy land. The corporation having failed to carry out those purposes, and having mortgaged their property to subscribers to the undertaking, the subscribers were by another private act (25 & 26 Vict. c. clxxxvi.) incorporated as the Brecon Markets Company; the property of the corporation of Brecon was (with certain exceptions) vested in them; powers were given to them similar to those given by the former act to the corporation, and in

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particular (by s. 65) they were empowered to erect slaughter houses with the written consent of the corporation, given under the hand of the mayor or the town clerk.

The company obtained the consent required by s. 65 of the second private act, erected a slaughter house, and demised the tolls to the plaintiff; but the corporation, acting as the local board, refused to license the use of the slaughter house, and the lessee could therefore levy no tolls. In an action brought by the lessee against the company for a breach of their agreement to let the tolls:—

Held, that the consent provided for by s. 65 of the private act neither constituted nor superseded the necessity of the licence of the corporation as the local board; that, in the absence of any evidence that the consent actually obtained was intended to operate as a licence under the Towns Improvement Clauses Act, 1847, it amounted only to a consent by the corporation under the private act; and that therefore the plaintiff was entitled to recover.

DECLARATION, stating that the defendants agreed to let to the plaintiff certain tolls described in the particulars of letting (which were set out), as “the tolls, rents, and tollage payable by virtue of the Brecon Markets Act, 1862,” and including the tolls of “the new slaughter house,” for one year from 1st of January, 1865; setting out also the conditions of letting, which provided, amongst other things, that the lessee should “comply with and fulfil the bye-laws and regulations of the board of health.” Breaches, that the defendants would not let to the plaintiff the tolls of the slaughter house, nor had they at any time during the term any right or title so to let them, and that by reason of their want of title, the plaintiff never had or could have, at any time during the term, the receipt and enjoyment of the tolls &c.

The defendants by their pleas denied the alleged breaches, and on these pleas issue was joined.

The cause was tried before Pigott, B., at the Brecon summer assizes, 1866. It appeared that the company had let by auction to the plaintiff the tolls of a slaughter house in Brecon, erected by them under the following special acts:—By 1 Vict. c. xii. certain powers to make slaughter houses, &c., and for that purpose to borrow money, were given to the corporation of Brecon. By 25 & 2 Vict. c. clxxxvi. (the Brecon Markets Act, 1862), which recited that various persons had subscribed money for the above objects, and were mortgagees of the corporation’s property, the subscribers were (s. 6) incorporated by the name of the Brecon Markets Company, and (s. 21) the property of the corporation was, with certain speci-

fied exceptions of public buildings, &c., vested in them. By s. 65 the company were empowered, with the consent of the corporation, testified by writing under the hand of the mayor or town clerk, to provide and maintain slaughter houses upon such sites as they should think expedient; by s. 76 they were empowered to take tolls from every person slaughtering cattle there; and by s. 82 to demise the tolls. Under this act the defendants erected a slaughter house, the tolls of which they let to the plaintiff. The slaughter house, however, being built in a thickly inhabited part of the town, a licence for its use was refused by the local board, and the plaintiff was therefore unable to obtain any benefit from his demise.

In answer to this objection, the defendants proved that before erecting the slaughter house, they had obtained the written consent of the corporation under the hand of the town clerk, in conformity with s. 55 of the Brecon Markets Act, 1862; and they gave secondary evidence of this consent, the original document having been lost. They contended first, that the corporation of Brecon being the local board for Brecon, the consent so given was in fact a licence from the board of health; and secondly, that the special act, being later than the act requiring the licence of the board of health, repealed it to this extent, and substituted the consent under s. 65 for the ordinary licence; but the plaintiff maintained that this consent was only required from the corporation as the mortgagors of the land on which it was expected the slaughter house would be erected; but that it had no relation to sanitary or public purposes, and did not, therefore, supersede provisions directed to secure the public health and convenience; and he further contended that the consent was not given by the corporation acting as a local board. The arguments of the plaintiff and the defendants respectively depended on the following acts:

By 13 & 14 Vict. c. 32, confirming a provisional order of the General Board of Health, the Public Health Act, 1848, was applied to Brecon.

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 12, it is provided, that when the act is adopted in any district exclusively consisting of the whole or part of one corporate borough, the mayor, aldermen, and burgesses of such borough (who by the Muni-

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icipal Corporation Act (5 & 6 Wm. 4. c. 76) s. 6, are the corporation and are to act through the council of the borough), shall be by the council of the borough, within such district, the local board of health under the act, and such council shall exercise and execute the powers, authorities, and duties of such local board, according to the laws for the time being in force with respect to municipal corporations in England and Wales.

By the adoption of the act, therefore, the corporation of Brecon became the local board of health.

By s. 45 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), which, by s. 5, takes effect in all places where the Public Health Act, 1848, has been adopted, the provisions of the Towns Improvement Clauses Act, 1847, as to (amongst other things) slaughter houses, are incorporated; by s. 6 a local board is substituted for the local board of health under the previous act, but is (s. 24) in corporate towns similarly constituted; and it is provided (s. 7) that, in the construction of the incorporated acts, the local board shall be deemed to be the "commissioners" or "undertakers."

The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), provides (s. 125) that the commissioners may license slaughter houses; (s. 126) that, after the passing of the special act, no new slaughter houses shall be used without the licence of the commissioners; (s. 127) that existing slaughter houses shall be registered; (s. 128) that the commissioners may make bye-laws for the regulation of slaughter houses; and (s. 129) that the justices before whom any one is convicted of an offence against the act or the bye-laws, may, in addition to inflicting the penalty provided by the act, suspend the licence of the person convicted for not more than two months, and may, on any subsequent conviction, revoke the licence, after which the commissioners may absolutely refuse a licence to such person. (1)

(1) The Fairs and Markets Clauses Act (10 Vict. c. 14) is also incorporated by 25 & 26 Vict. c. clxxxvi. s. 4; the former (s. 17) enables the "undertakers" to provide slaughter houses, and to give notice thereof; provides (s. 19) that, after the notice, no one shall slaughter in any but the slaughter house so pro-

vided, or one previously in use; and enacts (s. 18) that nothing in that act or in the special act, or in any act incorporated therewith, shall protect the undertakers from an indictment for nuisance, or from any other legal proceeding in respect of any such slaughter house as aforesaid.

The jury assessed the damages contingently at 17*l.*, but the learned judge being of opinion that the written consent rendered any further licence unnecessary, directed the verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter a verdict for him for the amount of damages so assessed. A rule having been obtained accordingly,

Jan. 18. *Mellish, Q.C., Bowen, and Hughes*, shewed cause. They maintained the arguments urged by the defendants at the trial, and cited *Pedder v. Mayor of Preston*. (1)

Giffard, Q.C., and Rees, supported the rule. They contended that the only purpose of the Brecon Markets Act, 1862, was to establish a trading corporation, and that s. 65 must be read by the light of the preamble to the act.

Cur. adv. vult.

Jan. 24. The judgment of the Court (Kelly, C.B., Channell, and Pigott, BB.) was delivered by

KELLY, C.B. The question in this case is, whether the plaintiff, who holds certain premises used as a slaughter house under the Brecon Markets Company, the defendants, with a warranty of title, can use these premises as a slaughter house, without the licence of the local board of health, under the Towns Improvement Clauses Act, 1847. If a licence be necessary, the defendants have failed to make a good title to the premises, and the plaintiff is entitled to a verdict. It is enacted by the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 126, that no place shall be used or occupied as a slaughter house in any town within which, as in Brecon, the act is adopted, unless and until a licence for the erection thereof, and for the use and occupation thereof as a slaughter house, has been obtained from the board of health; and certain penalties are imposed for the breach of this provision of the act. No licence has been obtained in this case; but it is contended for the defendants that, inasmuch as under s. 65 of the Brecon Markets Act, the company may, with the consent of the corporation of Brecon, erect a slaughter house, and under s. 82

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may demise and let it under certain terms and conditions, and as such consent has been obtained from the corporation, and the corporation, by the town council constitute the board of health at Brecon, either the consent, being given by the corporation, amounts to a licence by the board of health, or it confers an absolute right to erect and use a slaughter house, supersedes the provisions of the Towns Improvement Clauses Act, and renders a licence unnecessary.

Upon considering, however, the purview and general nature of this local act, it appears that it has been passed in order to enable a body of gentlemen interested in the town of Brecon, to form themselves into a company, to discharge the debts of the corporation, to possess themselves of the markets and the property of the corporation, which had been mortgaged to secure the debts, and to erect markets and slaughter houses, and to do other acts for the general benefit of the town, the duty to do which had formerly devolved upon the corporation. But this act has no relation whatever to sanitary measures, or to any of the purposes connected with the health or improvement of towns, which were the principal objects of the Towns Improvement Clauses Act. We see no reason, therefore, why the consent of the corporation to the erection of a slaughter house should dispense with the licence of the board of health under the Towns Improvement Clauses Act.

But some difficulty certainly arises from the corporation and board of health being in effect the same body of persons; and if the consent given had been in such a form as to enable the Court to see that it was the intention of the corporation at once to grant the consent required by the local act, and the licence required by the Towns Improvement Clauses Act, we might have held that the instrument conferred a sufficient authority. But the consent itself appears to have been lost; and the secondary evidence—that it was a very formal document, and that it expressly referred to the 65th section of the local act—rather leads us to the conclusion that it was the intention to grant the consent only, and that the corporation did not contemplate any act whatever in their capacity of the board of health, and did not really and in fact intend to grant the licence. The consent was given *alio intuitu*, and had relation only to the position in which the corporation stood in

respect to the markets company, and the execution by them of the powers conferred on them by the local act.

We think, therefore, that a licence by the corporation in the character of the board of health was necessary; that the want of the licence was a defect in the title to the premises; and that the plaintiff is consequently entitled to set aside the verdict for the defendants, and to enter a verdict in his favour.

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Rule absolute.

Attorneys for plaintiff: *Dobinson & Geare, for Cobb, Brecon.*

Attorney for defendants: *R. Fowke, for Games, Brecon.*

ROOTH v. THE NORTH EASTERN RAILWAY COMPANY.

Jan. 25.

Negligence—Railway Company—Liability as Carriers—Railway and Canal Traffic Act (17 & 18 Vict. c. 31) s. 7—Just and reasonable Conditions—Alternative to Customer—Complete Delivery.

A contract for the conveyance of cattle by railway, signed by the party sending them, contained the two following, amongst other, conditions:—

“The owner undertakes all risks of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatsoever.”

“The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them”:—

Held, that the first of these conditions was unreasonable, and that its unreasonable character was not removed by the fact that the company, under the second condition, granted and the owner accepted, a free pass for a person who travelled with the cattle sent.

DECLARATION. First count, that the plaintiff caused to be delivered to the defendants certain cattle of the plaintiff, then received by the defendants upon the terms that the defendants would safely carry the said cattle from Boroughbridge to Chesterfield and there deliver them to the plaintiff for reward to the defendants; and all conditions, &c., were fulfilled, yet the defendants did not safely carry the said cattle or deliver the same. Second count, that the plaintiff delivered to the defendants, being public carriers of cattle,

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certain cattle of the plaintiff upon the terms that the defendants would safely carry the said cattle from Boroughbridge to Chesterfield, and there deliver them to the plaintiff at a safe and proper place for the delivery of cattle for reward to the defendants; and all conditions, &c., were fulfilled, yet the defendants delivered the said cattle at an unsafe and improper place.

The defendants, amongst other pleas, traversed the bailments on the terms alleged. Issue thereon.

At the trial, before Montague Smith, J., at the Derbyshire summer assizes, 1866, the following facts were proved:—The plaintiff is a cattle dealer at Stretton, near Chesterfield, in Yorkshire. On the 27th of April, 1865, he attended a cattle fair at Boroughbridge in the same county, and there purchased ten heifers and five cows. He afterwards took these animals to the Boroughbridge station on the defendants' line, and there delivered them to the defendants to be carried to Chesterfield. At the same time he received and signed a ticket which contained the following statement of the terms on which the cattle were received:—"The owner undertakes all risk of loading, unloading and carriage, whether arising from the negligence or default of the company or their servants, or from defect or imperfections of the station, platform, or other places of loading or unloading, or of the carriage in which they may be loaded or conveyed, or from any other cause whatever. The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take charge of them."

The cattle were loaded in two trucks, and with them the plaintiff sent a regular drover, to whom a free pass was given. They arrived at Chesterfield about nine o'clock in the evening, and upon their arrival the drover gave up his pass, together with the cattle ticket which he had received from his master, the plaintiff. The cattle were then unloaded by a railway porter in the defendants' service with the assistance of the drover, and the plaintiff's nephew who had come to meet the train. The place at which the cattle were removed from the trucks was at a siding, wholly unprotected by fence or otherwise from the line, and only capable of accommodating one truck at one time. While the second truck was being unloaded, the cattle which had been removed from the first truck

strayed on to the line, and some of them were killed by a passing train.

The learned judge asked two questions of the jury upon these facts: first, whether there was a complete and safe delivery of the cattle to the plaintiff before the accident took place? and secondly, whether the cattle were delivered at a safe and proper place? The jury found, in answer to these questions, that there had been no complete delivery, and that the place was not safe and proper. A verdict was thereupon entered for the plaintiff, and leave reserved to move to enter it for the defendants.

A rule nisi was accordingly obtained, or for a new trial, on the ground that there was no evidence to be left to the jury of any bailment to the defendants on the terms alleged, or of any breach by them of the alleged contracts; that there was a delivery to the plaintiff and at a safe and proper place; that there was a special contract by which the plaintiff undertook the risk of unloading or delivery; that the verdict was against the evidence; and that the damages, if any, should have been nominal.

Cave (Digby Seymour, Q.C., with him) shewed cause. First, there was evidence that there was no complete delivery previous to the damage done to the cattle. The drover had, it is true, delivered up his pass and the cattle ticket, but the company's responsibility had not terminated. It was their duty to see the goods safely into the exclusive possession of the plaintiff's servants; *Hodgman v. West Midland Railway Company*. (1) Here the damage was done in the act of delivery. The process of unloading was not at an end. Secondly, the conditions are unreasonable and therefore void under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 7. The first clause, taken by itself, is clearly unreasonable, being perfectly general, and exonerating the company from responsibility for damage, however caused; *McManus v. Lancashire & Yorkshire Railway Company* (2); *Peek v. North Staffordshire Railway Company* (3); *Gregory v. West Midland Railway Company* (4);

(1) 5 B. & S. 173; 33 L. J. (Q.B.) 233.

(2) 4 H. & N. 327; 28 L. J. (Ex.) 353.

(3) 10 H. L. Cas. 473; 32 L. J. (Q.B.) 241.

(4) 2 H. & C. 944; 33 L. J. (Ex.) 155.

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Simonds v. Great Western Railway Company. (1). But conditions, although unreasonable in themselves, may be made reasonable, if an alternative is offered to the customer; and the circumstance that the company promise to give, and in this case did give, a free pass to the plaintiff's drover, may be relied upon as making it reasonable for them to stipulate for freedom from liability for damage done to the cattle. Such a condition, however, cannot protect the company, because the alternative course which the plaintiff might have adopted was not itself just or reasonable: *McManus v. Lancashire and Yorkshire Railway Company* (2); *Lloyd v. Waterford and Limerick Railway Company.* (3) It was, if anything, for the conveyance of cattle without a drover, but still subject to the company's first condition, which is perfectly general in its terms, and applies to the carriage of cattle with or without drovers. The free pass is for the mutual advantage of both parties, as well for the greater safety of the live stock as for the greater convenience of the company. It cannot be that the acceptance of a free pass for a drover by the sender would prevent responsibility from attaching to the company for damage done by acts over which the drover neither had nor could have any possible control.

[MARTIN, B. The first clause, which applies to risks of "carriage," would protect the company from the consequences of a collision caused by the neglect of their servants.]

That is so, and is clearly unreasonable. In *Gregory v. West Midland Railway Company* (4) the owner of the cattle was to ride free; but that was held insufficient to free the company from liability for damage caused by their own negligence.

[KELLY, C.B. May it not be possible that such a condition may be good in part and bad in part? It is conceivable that, where a company give a free pass to a drover, they may claim immunity from the risks incident to loading and unloading, but not from those arising during the transit.]

Conditions, like this one, must be treated as a whole; or even if not, the jury have found that no safe and proper place was pro-

(1) 18 C. B. 805.

(3) 15 Ir. Com. L. Rep. 37.

(2) 4 H. & N. 327; 28 L. J. (Ex.) 353.

(4) 2 H. & C. 944; 33 L. J. (Ex.) 155.

vided for unloading the cattle. The damage, therefore, has occurred from a cause which no skill on the part of the drover could remove. The landing place was insecure, and although the company were under no absolute obligation to fence their premises from the line, in order to protect animals under their customers' exclusive control, *Roberts v. Great Western Railway Company* (1), they were bound to make the premises reasonably fit for the purposes for which they used them. The case of *Pardington v. South Wales Railway Company* (2) is distinguishable, because there the damage could have been guarded against if the drover had done his duty. [He also contended that the verdict was in accordance with the evidence.]

Field, Q.C., and *A. Wills*, in support of the rule. First, the delivery was complete when the live stock were handed over to their custodian. When the company had placed the cattle on the platform in the care of the plaintiff's servant and of his nephew, their duty as carriers was done, and they only remained liable generally to protect the animals whilst assisting the drover to remove them from the station yard, and would incur nominal damages only for not having a fence between the siding and the line. Secondly, assuming the delivery not to have been complete, the place was "safe and proper." There was no duty on the company to have a pen or fence: *Roberts v. Great Western Railway Company*. (1)

[*MARTIN, B.* That may be very true. But, in the absence of conditions, the defendants are liable, except for the act of God and the king's enemies.]

It has been doubted whether the ordinary law of carriers applies to cattle, but, granting that it does, the conditions in this case are valid and limit the company's responsibility. They are severable like bye laws which have been held so to be: *Rea v. Company of Fishermen of Faversham* (3); and, so far at all events as they concern the risks of loading or unloading, are reasonable. It may be that the protection given would not extend to damage done by the defendants' negligence during the carriage of the cattle, but

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(1) 4 C. B. (N.S.) 506; 27 L. J. (C.P.) 266.

(2) 1 H. & N. 392; 26 L. J. (Ex.) 105.

(3) 8 T. R. 352.

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the word "carriage" may be rejected. It may also be conceded that, taken alone, the first clause is unreasonable. But reading it without the word "carriage," and in conjunction with the clause offering a free pass for his drover to the sender, it is reasonable. The plaintiff accepted this pass; he might, if he pleased, have declined it when the company would have had to take the risks of loading and unloading on themselves. His acceptance of it constitutes a sufficient consideration for an indemnity given by him to the company against those risks. As regards them the plaintiff became the insurer. [They also contended that the verdict was against the evidence.]

KELLY, C.B. I am of opinion that this rule should be discharged. Several points have been made during the argument, of which the first is as to the first condition under which the defendants agree to carry cattle. It is contended that this condition is in parts unreasonable. On the other hand, it is said that it may be good in part and bad in part, and that the part material to this case is good and reasonable; or, again, even if this be not so, that the subsequent clause in the conditions, offering free passes to persons having the care of live stock, makes the first condition, though in itself unreasonable, binding on the plaintiff. Now, I desire to abstain from saying whether this condition may or may not be divisible in law, so as to be good in one part, and bad in another. The substantial question is, whether the subsequent paragraph in the conditions, respecting free passes to drovers, makes it reasonable on any construction. The authorities cited on behalf of the plaintiff shew that, in order to disentitle the owner of the cattle carried to complain, a *choice* must be left to him to accept or to refuse the offer of the company. If he accept it, he is disentitled. If he reject it, the company are thrown back upon or left to their common law liability. In the present case, I cannot see that any alternative was offered to the plaintiff. There is simply an offer to him to give a free pass to any persons whom he may choose to send with his cattle. The choice of accepting or refusing to have his goods carried subject to the first condition is not given to him. Then, secondly, I regard the first condition as altogether void, even assuming the

conditions may be read together. I am by no means, however, ready to hold it unreasonable that the company should provide that any owner who was willing to do so should undertake the risk of loading and unloading. If they think fit to commit this duty to the owner, and he chooses to undertake it, it does not seem unreasonable that there should be a stipulation relieving the company from liability for damage incurred during the process of loading or unloading. But it is impossible to contend that a stipulation is binding which secures the company against damage arising from all risks of loading, unloading, and carriage, however caused, whether from the negligence of their servants, the imperfection of their station accommodation, or otherwise. Such a provision cannot limit their common law duty to take reasonable care of their stations, and to see that those places over which the cattle have to go on their way to or from the company's carriages are in a condition to ensure to those cattle a safe means of transit. If, therefore, all that the defendants contend for is established, I do not think it could be said that they were not bound to supply a safe and proper place for the plaintiff's animals to be unloaded; and in this case they did not do so.

With regard to the other points in the case, it is said that the delivery was complete, and therefore that the company's liability was at an end. But, granting that in a certain sense there had been a delivery, still, that circumstance does not discharge the company from their duty of providing a safe and proper means for these cattle to cross the line, and leave the premises. The sole question really is, whether the company had fulfilled their common law obligation, which nothing, in my opinion, had abridged, of providing a safe mode of exit and transit. That question was left in a twofold manner to the jury. "Was there," they were asked, "a complete and safe delivery?" and, "Was there a proper place to deliver?" The one question involves the other. The question, that is, of safe and complete delivery involves that of whether a safe and convenient place to deliver was provided. The jury found that there was no such delivery, and no proper and convenient place, and I see no reason for disturbing their verdict.

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I should add a word as to the case relied on by the defendants, of *Roberts v. Great Western Railway Company*. (1) There, the declaration contained an express allegation of an absolute legal obligation to provide a fence to a yard near a railway station, and it was held impossible to say that that special precaution must necessarily be taken. That was the ground of the decision. But in this case the duty of providing some sort of safeguard is not alleged specifically, but in general terms. All the points, then, made by the defendants fail. This rule, therefore, should be discharged.

MARTIN, B. I am of the same opinion. If there had been no condition, the state of affairs would have been simply a bailment of cattle to the defendants by the plaintiff, he sending a man to look after them during the journey. Then, at Chesterfield, a servant of the defendants came and assisted in the operation of delivering the cattle. But what took place there, was not a "delivery." If the articles carried had been inanimate, it might have been different. But here, the goods were live animals, and could not be delivered in the same manner. They were simply brought out of the truck on to the platform, and, though the plaintiff's servant was there, and may have touched them, there was, in my opinion, no such delivery to him as to exonerate the company. Then, what is the common law consequence of the plaintiff's man being in charge? The case is similar to that of the nurse and child, where the Court of Exchequer Chamber held the railway company free from liability. But there the child was in the exclusive charge of the nurse, and she was herself guilty of negligence. (2) Here the drover was not in exclusive charge of the cattle, and was guilty of no negligence. The mere fact of his presence cannot make any difference in the common law liability of the company. Then, does the condition make any difference? I think not. Taken alone, it is clearly unreasonable; and, assuming it to be divisible, and reading it with the third condition, which provides that the person having charge of the cattle is to have, if

(1) 4 C. B. (N.S.) 506; 27 L. J. (C.P.) 266.

Waite v. North Eastern Railway Company, 28 L. J. (Q.B.) 258.

(2) The case referred to seems to be

he pleases, a free pass, I do not think it affects the common law liability, unless the person in charge of the cattle was guilty of negligence. I concur altogether, both on this point and on the others, with the Lord Chief Baron.

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CHANNELL, B. I am also of opinion that this rule should be discharged. The defendants would have done a great deal if they could have established that there had been a complete delivery. But it does not follow that there was such a delivery, because a person appointed by the plaintiff was present to receive the cattle. The question was for the jury, and they found that the cattle were not safely and completely delivered, and that there was no safe or convenient place provided for their delivery. We must take it, therefore, that there was no delivery, and, in consequence, no termination of the company's liability as common carriers. Then comes the question as to the special condition which arises on the plea traversing the bailment on the terms alleged. The contract containing the condition we are to take as signed by the plaintiff, and, if binding, the defendants can say that there is a variance between the contract declared on and that proved. The statute (17 & 18 Vict. c. 31), s. 7, however, has enacted that no condition like this shall bind unless it is reasonable, and if it be unreasonable in this case, the plaintiff may declare on the common law liability of the defendants as carriers. Now, it is conceded that, if we are to take the first paragraph of the conditions by itself, according to the decided cases, it is unreasonable. But then it is said to be reasonable in two ways: first, on the ground that a part of the first paragraph is severable from the rest of it, and that what remains after the severance is reasonable. If it were necessary to decide the point, I should be disposed to hold the condition not capable of being thus severed. The whole of it applies to the same and not to different subject matters, viz. to the carriage of cattle. The word "carriage," therefore, cannot be taken out. Suppose, however, that it could be, still, even in that form I regard it, when standing alone, as unreasonable.

Secondly, it is contended that the paragraph lower down in the conditions is to be read with it, and that, taking both of

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them together, the whole is not unreasonable. Now, the company cannot be placed in a better position than if we read that paragraph first, and the first after it, when the whole would run somewhat as follows: "Inasmuch as the company offer a free pass to any person sent to take care of the cattle they may carry, they will not be liable, when that pass is accepted, for any risks, however caused, arising from loading, unloading, or carriage." But even then the condition would be unreasonable, and if the word "carriage" is left in its place, there would be no answer to the suggestion made by my Brother Martin, that the company would not be liable for damage resulting from a collision caused by the negligence of their own servants. Again, excluding that word, and reading the two conditions in the manner I have suggested, which is most favourable to the company, the unreasonableness, in my opinion, is not got rid of. There is no consideration for an indemnity given to the company by the plaintiff for keeping an imperfect and insecure station. On all points, therefore, I think a satisfactory answer can be given to the defendants' contention, and accordingly the rule must be discharged.

PIGOTT, B. I have little to add to the opinions of the other members of the Court, in which I entirely agree. As to the delivery, we must look at the nature of the articles to be delivered. They were cattle, contained in two trucks. One only could be turned out at a time, and the cattle contained in it, therefore, had to wait on the station, and could not be taken away by the plaintiff's servant, until the second truck had been pushed up and unloaded. Under these circumstances, the defendants cannot be said to have "delivered" the cattle, and the jury were, I think, right in finding that there had not been "a complete delivery." Again, was the place for delivery "safe and proper"? The jury have found that it was not, and although I should not have thought the contrary verdict wrong, there is plenty of evidence to support it as it stands. With regard to the special condition, taken alone it is clearly unreasonable; and I do not think it can make any difference, under the circumstances of this case, that a servant of the plaintiff was permitted to travel free of charge with the cattle train. He did all he could, and had no control whatever over the cause of the

accident. The defendants therefore, in my opinion, are liable in this action.

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Rule discharged.

Attorneys for plaintiff: *Burt & Stevens, for Cutts, Sheffield.*

Attorneys for defendants: *Beale, Marigold, & Beale.*

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*Deed under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134, s. 192)—Release—
Action on Judgment—Time for Pleading—Practice.*

In a former action by the plaintiff against the defendant, the defendant pleaded never indebted, but afterwards withdrew his plea, on an agreement that judgment should not be signed before the 8th of May. On the 7th of May, the defendant registered a deed under the Bankruptcy Act, 1861, s. 192, containing a release from his creditors, but he did not plead it in the action. On the 8th, the plaintiff signed judgment. In an action brought on the judgment:—

Held, that the interval between the registration of the deed and the signing of judgment did not give the defendant such an opportunity of pleading the deed as to disable him from availing himself of it in the second action.

Held, also, that the agreement, under which the plea of never indebted was withdrawn, precluded the defendant from pleading any other plea in the former action, and that he might, therefore, now avail himself of the deed.

Quære, whether, supposing the defendant had had the opportunity and power of pleading the deed, and had neglected to do so, he could now avail himself of it? (1)

SPECIAL CASE, stating the following facts. (2)

This was an action brought upon a judgment, recovered by the plaintiff against the defendant in this court.

(1) See *Staffordshire Banking Company v. Emmott*, Weekly Notes, p. 71, February 23rd, 1867; to be reported.

(2) The special case was stated after issue joined, but the pleadings were not made a part of the case. The substance of them was as follows:—

Declaration—on a judgment recovered by the plaintiff against the defendant on the 8th of May, 1866.

Plea—setting out, with the usual averments, a deed registered under the Bankruptcy Act, 1861, s. 192, which

contained a release of the defendant by his creditors.

Replication—that the deed was executed, &c., and all other the matters and things in the plea mentioned, necessary to make the deed binding on the defendant's creditors under the Bankruptcy Act, 1861, were done and happened, if at all, before the 8th of May, 1866, and before the judgment sued on was recovered, and that the said matters and things, and grounds of defence, in the plea mentioned, might

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The former action, which was for goods sold and delivered, and on accounts stated, was commenced on the 5th of April, 1866. On the 25th of April the defendant pleaded the general issue, but on the 30th withdrew his plea, upon the stipulation that judgment was not to be signed until the 8th of May following.

On the 7th of May, a deed, executed by the defendant (as debtor) and assented to by the statutory number of creditors, was duly registered under s. 192 of the Bankruptcy Act, 1861, and by it the creditors of the defendant released him from all debts, demands, and suits.

Notice of the registration of the deed was, on the same day, given to the plaintiff's attorney, the plaintiff not being an assenting creditor, and on the following day (the 8th of May) it was gazetted.

On the 8th of May the plaintiff signed judgment.

The question for the opinion of the Court was stated to be whether the plaintiff was entitled to recover in the present action.

Jan. 16. *J. Brown, Q.C.*, for the plaintiff. It appears upon the case that the deed contained a release; the plaintiff contends, therefore, that the defendant cannot now avail himself of it, if he had any opportunity of pleading it in answer to the original action. The dates shew that he had an opportunity: for the deed was registered on the 7th of May, and judgment was not signed till the 8th; the defendant had therefore the whole time up to 11 o'clock on the 8th, when the office opened, and before which judgment could not be signed: *Connelly v. Bremner*. (1) The substantial question therefore is, whether the case does not fall within the general rule laid down in *Bradley v. Eyre*, and *Bradley v. Urquhart* (2), that to an action or a sci. fa., on a judgment, the defendant cannot plead in bar anything which he could have

and should have been pleaded in bar to the former action, but that the plaintiff wilfully neglected and omitted so to plead them. The plea then stated that after the happening of the said matters, and the omission to plead, judgment

was recovered; and it set out the record in the former action, by which it appeared that judgment was recovered for default of a plea. Issue.

(1) Law Rep. 1 C. P. 557.

(2) 11 M. & W. 432, 456.

pleaded to the original action. This rule was applied to a plea of a certificate in bankruptcy, in *Todd v. Maxfield* (1), and so far as s. 161 of the Bankruptcy Act, 1861, is concerned, that case is a direct authority in favour of the plaintiff; for that section does not for this purpose differ from the corresponding section of the two previous acts (6 Geo. 4, c. 16, s. 121; and 12 & 13 Vict. c. 106, s. 200). But further, it was lately held in this court, that the same rule deprived a debtor who had executed a deed similar to the present one, of the protection from process to which s. 198 would have otherwise entitled him: *Whitmore v. Wakerley*. (2)

[KELLY, C.B., referred to *Hartley v. Mare* (3), and to the discussion of that case on the argument in *Staffordshire Banking Company v. Emmott*. (4)]

In the case of *Hartley v. Mare* (3), the argument in support of the application by the inspectors turned principally on the fact that the objection was only valid against the debtor, and that his default could not affect the inspectors, who had never had any opportunity to plead the deed.

[KELLY, C.B. But the judgment proceeded on the ground that the 198th section deprived the creditor of power to realize his judgment. There is no distinction made in the section between deeds which contain a release, and those which do not, nor between the position of the debtor himself in making such an application, and that of his inspector or trustees. The language of the section is prohibitory of the creditor making any process available. The plaintiff is in the same position as if he had executed a release at common law to the defendant.

CHANNELL, B. Suppose the plaintiff had actually executed the release, and then gone on and signed judgment, could the defendant have then claimed the benefit of the deed?]

It is submitted that he could not.

[KELLY, C.B. Would it not, in such a case, be a fraud on the debtor, and upon the other creditors, that, after being a party to the arrangement, the plaintiff should issue execution against the goods to which the debtor must look for payment of that composi-

(1) 6 B. & C. 105.

(3) 19 C. B. (N.S.) 85; 34 L. J.

(2) 3 H. & C. 538; 34 L. J. (Ex.) 83. (C.P.) 187.

(4) Weekly Notes, p. 71, February 23rd, 1867; to be reported.

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tion which the plaintiff and the other creditors had mutually agreed to accept?]

Great injustice would be done by allowing the defendant to adopt this mode of proceeding, for, if he had pleaded the deed, the plaintiff would, under r. 22 of Trinity Term, 1853, have been entitled to his costs: *Chitty Pr.* vol. ii. p. 920, 12th ed.; whereas, by his abstaining from raising this defence, the plaintiff has incurred costs which he can neither prove under the deed nor sue the debtor for: *Willett v. Pringle* (1); *Ex parte Hill* (2); *Ex parte Poucher* (3); and the plaintiff might be thus affected, although the deed were registered before declaration, and although issues of fact were afterwards tried, and verdict and judgment obtained upon them.

[CHANNELL, B. Suppose no case had been stated, and the defendant had been put to plead these facts, in what form would his plea have been framed?]

He could have framed no plea which would not have been open to the objection that he might have pleaded it to the original action. No plea could be based on s. 198, for it does not discharge the debt, or the judgment, or execution.

[The Court inquired whether the case was to be treated in the same way as if it were a motion by the debtor to direct the sheriff to withdraw from possession in an execution issued upon the former judgment.

J. Brown, Q.C., replied, that the question was, whether the plaintiff was entitled to maintain the present action, or whether the defendant could oppose any legal or equitable defence to it.

A. L. Smith replied, that the question was, whether the plaintiff could recover the money.]

A. L. Smith, for the defendant, relied upon the provisions of s. 198, and contended that the present action was brought in fraud of the act. If there had been any good cause for allowing the former action to proceed, the plaintiff might have applied to the Court of Bankruptcy, under s. 198, for leave to proceed and to obtain execution; but by his omitting to do so, and bringing the present action, he shews that he knew his application would be unsuccessful.

(1) 2 B. & P. (N.R.) 190.

(2) 11 Ves. 646; 2 B. & P. (N.R.) 191 n.

(3) 1 Gl. & J. 385.

Hartley v. Mare (1) is in substantial contradiction to *Whitmore v. Wakerley* (2), and supports the view that the operation of s. 198 is not affected by the fact of the registered deed containing a release. The defendant's reasoning is analogous to that on which it was held that, although ordinarily an action may be brought in the superior courts upon a judgment in an inferior court, yet no action can be maintained on a judgment recovered in a county court, because it would be contrary to the policy and intention of the county court acts. *Berkeley v. Elderkin* (3); *Austin v. Mills*. (4) The present attempt is equally in contravention of the Bankruptcy Act, 1861: Admitting that the plaintiff was entitled to go on and obtain judgment, he did so at his peril; he could not obtain execution; and, therefore, he is not entitled to maintain this action. With respect to costs, he could probably have obtained them under the deed; *Lewis v. Piercy* (5) is an authority contrary to those cited on the other side. Assuming, however, that the defendant ought, if possible, to have pleaded the deed, there was here no sufficient time; and further, on the withdrawal of the plea, it was an implied term of the agreement that no further plea should be pleaded.

J. Brown, Q. C., in reply.

Cur adv. vult.

Feb. 12. The judgment of the Court (Kelly, C.B., Channell and Piggott BB.) was delivered by

KELLY, C.B. This is an action upon a judgment, and the form of the question submitted to the Court upon a special case is, whether the plaintiff is entitled to recover; by which we understand that the Court is called upon to determine whether the plaintiff can enforce his judgment by execution against the defendant; and we are of opinion that he cannot.

The defendant was indebted to the plaintiff in the sum of 13*l.* 7*s.*, and the plaintiff commenced an action to recover this sum, and the defendant at first pleaded the general issue; but afterwards on the 30th of April, 1866, by the consent of both parties the plea was withdrawn, and judgment was to be signed on the 8th of May. On the 7th of May a deed of composition in strict

(1) 19 C. B. (N.S.) 85; 34 L. J. (3) 1 E. & B. 805; 22 L. J. (Q.B.) 281.
(C.P.) 187. (4) 9 Ex. 288; 22 L. J. (Ex.) 263.

(2) 3 H. & C. 538; 34 L. J. (Ex.) 83. (5) 1 H. Bl. 29.

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accordance with the provisions of the 192nd section of the Bankruptcy Act, 1861, was duly registered in bankruptcy, and notice of the deed was given on the same day to the plaintiff, and the deed was advertised in the *London Gazette* on the 8th of May.

Under these circumstances, it is contended on behalf of the defendant that the registration of the deed disentitles the plaintiff to enforce his judgment by any execution, and that the question submitted to the Court must be answered in the negative. The plaintiff, however, contends that inasmuch as the defendant might have pleaded the deed in bar to the further maintenance of the action before the signing of judgment on the 8th of May, he cannot now avail himself of it to defeat an execution by the plaintiff on the judgment that he has obtained.

We think it is a sufficient answer to this argument that, although it may have been physically possible for the defendant to have put in a plea late on the afternoon of the 7th, or early on the 8th of May, before the judgment was signed, this is not such an opportunity of pleading a plea as a defendant can be held bound to make available, even supposing that his omission to plead disentitles him in point of law to the benefit of ss. 197 and 198 of the Bankruptcy Act. But we are also of opinion that, had there been time for the pleading of this plea by the defendant, he was precluded by the terms of the agreement with the plaintiff, under which he withdrew his plea of the general issue, from pleading any plea at all, or otherwise from preventing the defendant from signing judgment on the 8th of May.

It is therefore unnecessary in this case to determine whether under any circumstances, the omission to plead in bar to an action deprives the defendant of any benefit to which he may be entitled under the provisions before referred to, and to be found in ss. 192—198 inclusive, of the act.

And we are of opinion that upon the facts stated, the plaintiff is not entitled to enforce this judgment, and that the question submitted to the Court must be answered in the negative.

Judgment for the defendant.

Attorneys for plaintiff: *Spyer & Co.*

Attorneys for defendant: *Miller & Stubbs.*

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Deed under Bankruptcy Act, 1861 (24 & 25 Vict. 134), s. 192—Material Addition to Deed after Registration—Schedule of Creditors.

A deed was registered under s. 192 of the Bankruptcy Act, 1861, which was expressed to be made between the debtor, a surety, and scheduled creditors. At the time of registration no schedule was annexed, but a schedule was afterwards added by the debtor:—

Held, that the addition of the schedule vitiated the deed.

THIS action was commenced on the 2nd of June, 1866, under the Bills of Exchange Act, 1855, and judgment was signed on the 18th. On the 16th the defendant executed a deed under s. 192 of the Bankruptcy Act, 1861, which purported to be made between the debtor of the first part, a surety of the second part, and “the several persons whose names or firms are set forth in the schedule hereto, hereinafter styled creditors, of the third part.” It recited that the creditors had agreed to accept a composition of 5s. in the pound, to be secured by the joint and several promissory notes of the debtor and his surety; that the composition to be so secured was payable to non-executing and non-assenting creditors; and that the promissory notes had been deposited with the surety, to be held by him in trust to deliver the same to such last-mentioned creditors respectively on demand, as the surety by the deed acknowledged. In consideration of the premises each of the said creditors of the debtor, who should have executed or assented to, or who should be bound by, the deed, released the debtor absolutely, reserving rights against sureties. It was declared that the deed was intended to operate under s. 192 of the Bankruptcy Act, 1861. No schedule was annexed.

The deed was registered on the 20th of June, and gazetted on the 22nd.

On the 28th the defendant's goods were seized, under a *fi. fa.* issued at the suit of the plaintiff, and on the 3rd of July the defendant took out a summons at chambers to set aside the execution. Upon this summons an order was made by Willes, J., directing the sheriff to withdraw, on the defendant's paying into Court the sum of 30*l.* to abide the order of the Court.

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At the hearing of the summons various objections were raised by the plaintiff to the validity of the deed, and a doubt was suggested by the learned judge, whether the absence of a schedule did not vitiate it, since without a schedule there were no parties of the third part. A schedule was afterwards added to the deed.

The money having been paid in under the above order, the defendant, after the addition of the schedule, obtained a rule for the payment of the money out of Court to him, against which

Nov. 24. *Pinder* shewed cause. (1) He contended that by the reference to the schedule in the deed, the schedule became a material part of it, and the deed was therefore vitiated by the addition: *Weeks v. Maillardet*. (2) He further contended that, without a schedule the deed would be bad for want of parties; and, thirdly, that the provisions of the deed were unreasonable, for either it gave no benefit to any of the creditors, since it contained neither covenant nor assignment; or, if there was an implied covenant, it was one on which only executing or scheduled creditors could sue, and created an inequality.

H. Atkinson, in support of the rule, contended that the deed was good without the schedule, since it was for the benefit of all the creditors; none could sue, but the surety was a trustee for all; and this being so, the schedule was immaterial, and the deed not affected by its addition. He cited *Scott v. Berry* (3) and *Blumberg v. Rose*. (4)

Cur. adv. vult.

Feb. 12. The judgment of the Court (Kelly, C.B., Martin and Pigott, BB.) was delivered by

KELLY, C.B. The question in this case is, whether a composition deed of the 16th of June, 1866, is valid and binding upon the creditors within the provisions of the Bankruptcy Act, 1861.

(1) This rule was first argued on November 13; (*Pinder* shewing cause in the first instance), and the deed was then treated as if the schedule was part of it at the time of registration. The Court reserved judgment; but, before judgment was delivered, the plaintiff having discovered that the schedule

was subsequently annexed, *Pinder* obtained leave to re-argue the case, and it was accordingly re-argued as here stated.

(2) 14 East, 568.

(3) 3 H. & C. 966; 34 L. J. (Ex.) 193.

(4) Law Rep. 1 Ex. 232.

The deed purports to be made between W. T. Price (the debtor) of the first part, Frederick Price of the second part, and "the several persons whose names or firms are set forth in the schedule hereto, hereinafter styled creditors, of the third part." It recites that the debtor, being unable to meet his engagements with his creditors, had proposed to pay them a composition of 5s. in the pound, by means of promissory notes, to be signed by W. T. and F. Price respectively, and which notes the creditors had agreed to take in full discharge of their debts; and that the said composition to be secured by the said promissory notes was payable to creditors who had not executed or assented to the said deed; and that such notes had been deposited with F. Price, "to be held by him in trust to deliver the same respectively to such last-mentioned creditors respectively on demand."

The deed then provides that, in consideration of the premises, each of the said creditors of the said W. T. Price, who should have executed or otherwise assented to, or should be bound by the said deed, did thereby release and discharge the said W. T. Price, and his estate and effects, from all debts and sums of money due by him to such creditors respectively. This deed was executed by W. T. Price and by F. Price, but not by any creditor or creditors, or any person or persons purporting to have been parties of the third part; and neither at the time of the execution nor of the registration of the deed had any person or persons executed it, except W. T. and F. Price; nor was any schedule annexed to the deed, or in existence, at either of those periods. But a schedule, containing the names of a number of creditors and the amount of their debts, was at a subsequent time appended or attached to the deed.

It is alleged generally in the affidavit of the defendant that the deed was, prior to the registration thereof, duly assented to by the requisite majority of the creditors, but neither the schedule referred to, nor any paper containing the assent in writing of such majority, is made an exhibit or brought before the Court.

Under these circumstances, the question is, whether the deed was a bar to a debt claimed by a creditor who had neither executed nor assented to it; and we are of opinion that it was not.

Three objections were made to this deed:

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First, that the affidavits are not such as to satisfy the Court that the deed was assented to in writing by the requisite majority of creditors. Inasmuch as the schedule purporting to have been annexed to the deed was not annexed to it until long after its execution and registration, and neither that schedule, nor any paper containing the assent in writing of any creditors is before the Court at all, we are left in doubt whether some of the requisite assents may not have been given by this schedule, and are, therefore, not satisfied that they were given in due time, and we must therefore hold the deed upon this ground to be invalid.

Secondly, we are of opinion that the annexation of the schedule to the deed after execution and registration, the schedule having thus become part of the deed itself, altered the deed in a material particular, and made it void.

Thirdly, it is objected to the deed that certain creditors, whose names are set forth in a schedule thereto, purport to be made the parties to the deed of the third part; and it appears that no schedule was attached to the deed at all, and that no one creditor of the third part executed the deed, and that there was therefore no deed to which any subsequent assent in writing of the majority of the creditors could apply.

The first and second of these objections being fatal to the deed, it is unnecessary to consider the last; and we think, upon the grounds already referred to, that the rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Treherne, Whites, & Renard.*

Attorneys for defendant: *Eyre & Lawson.*

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Jan. 31.

Contract of Sale—Construction—Condition Precedent.

The plaintiffs contracted to supply the defendants with goods, "delivering on April 17th, complete 8th May." The plaintiffs made no delivery on the 17th, and the defendants on the following day rescinded the contract, and refused subsequent tenders of the goods. The plaintiffs having brought an action for non-acceptance:—

Held, that, if on the true construction of the contract the plaintiffs were bound to commence the delivery on the 17th of April, the defendants were entitled to rescind for the failure to deliver on that day; but

Quære, whether the contract bound the seller to commence delivery on the 17th of April?

Held, per Kelly, C.B., and Pigott, B., that it did not bind the seller to commence delivery on the 17th, but only to deliver at reasonable times between the 17th and the 8th; per Martin and Bramwell, BB., that it did bind the seller to commence delivery on the 17th.

ACTION for not accepting goods, to be made and delivered by the plaintiffs to the defendants, according to a contract set out in the declaration.

The contract was as follows:—"Manchester, 21 March, 1866.—To Messrs. Coddington & Sons. Copy of order contracted with you this day. For white 900 L cloths, 44/32 yards, 13 × 12, 8½ lbs., made up in laps. Cloth as before. Heading 3 Red in both ends, leaving 6 inches of a tab, goods for bleaching. If the headings are not fast, will be returned white to the makers or agents, and the bleaching charged to them. *Delivering on April 17; complete 8 May.* Terms, 1½ % in 30 days. This is made in duplicate, each party keeping one.

(Signed)

"Duca Paleologo & Son."

Third plea, that the plaintiffs were not ready and willing to deliver the goods according to the contract.

Issue thereon.

No goods were delivered on the 17th of April, and on the following day the defendants wrote to rescind the contract, alleging that their customers had cancelled their orders. Deliveries, amounting altogether to the whole 900 pieces, were tendered on the 23rd, 26th, and 30th of April, and on the 3rd of May, and were refused.

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At the trial of the cause before Martin, B., at the Manchester summer assizes, 1866, evidence was given to the effect that the practice was, under similar contracts, to begin as soon as possible after the first day named, and to complete on the last day named; but that there was no rule as to the quantity of a delivery. A verdict was found for the plaintiffs for 240*l.*, with leave to the defendants to move to enter a verdict for them. A rule having been obtained accordingly,

Nov. 23. *James, Q.C.*, and *Jones, Q.C.*, shewed cause. The Court must put a reasonable construction on the contract, and interpret it so as to effectuate the probable intention of the parties. On the one side the manufacturer desires to fill up his time, and to have power to use his opportunities for manufacturing and delivery, and to adjust his performance to them; on the other side, the merchant desires to have a date fixed by which he will certainly have his whole order completely fulfilled. The date of completion is, therefore, fixed rather in the interest of the merchant, but the date of commencement is fixed in the interest of the manufacturer. The essential terms, therefore, of the contract are, that the manufacturer is entitled to commence delivery, and the merchant bound to accept, on the first day named; and that the manufacturer is bound to complete on the last day named. The mode of delivery within those limits will be that which is indicated by the evidence, deliveries in reasonable quantities, at reasonable intervals. But this mode of delivery is not an essential term, and therefore not a condition precedent; its breach does not determine the contract, but only gives ground for a cross action. The substance of the contract is fulfilled, and the main intention of the parties realized: *Boone v. Eyre*. (1) If the rigorous construction contended for by the defendants is adopted, it must be applied throughout, and the contract will be fulfilled if any part is delivered on the first day, and the rest delivered on the last day, for the contract is silent as to any intermediate deliveries. The intimation of opinion by Channell, B., at the end of his judgment in *Hoare v. Rennie* (2) is in favour of the plaintiffs' contention, for if the subsequent deliveries in that case would have been good, not-

(1) 1 H. Bl. 273, *n.*

(2) 5 H. & N. 19; 29 L. J. (Ex.) 73.

withstanding the breach of contract in the first monthly shipment, the defendants here were not entitled to refuse the subsequent deliveries merely because of the default on the 17th of April.

Temple, Q.C., and *Holker*, in support of the rule. It is admitted that the plain English of the contract is, that something shall be done towards the fulfilment of the contract on the first day named, and that the opposite construction must be reached by conjecture. But if conjecture is used, it may be rather said that all delay is for the benefit of the vendor, and promptitude for the benefit of the vendee; that each stipulation must be construed in favour of the party for whose benefit it has been introduced, and that the vendee is therefore entitled to have a delivery on the first day named. That delivery must be according to the custom of the trade, that is, a substantial delivery. The decision in *Hoare v. Rennie* (1) is in favour of the defendants, and proceeds not so much on the ground of a distinction between stipulations and conditions precedent, as on the ground that the party to a contract who has himself broken it cannot enforce it against the other side. They cited *Duncan v. Topham* (2); *Cox v. Todd* (3); *Wilkinson v. Gaston* (4); and *Behn v. Burness*. (5)

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Cur. adv. vult.

Feb. 12. The following judgments were delivered:

BRAMWELL, B. I agree with the defendants' construction. It has the merit of being literal, and I think reasonable. The agreement is, the seller shall not be bound to deliver before the 17th of April, nor the buyer to take; but delivering and taking shall begin on the 17th, and finish by the 8th May. The plaintiffs' construction is not literal, and I think not reasonable. It is, "The buyer must begin to receive on the 17th. If I choose, I need not deliver then, but may afterwards, provided I complete on or before the 8th of May." It seems to me this would enable the seller to postpone delivery till the 8th; for, if he is not to deliver on the 17th, why on the 18th, 19th, and so on? If it is said he must deliver within a reasonable time after the 17th, what

(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.

(4) 9 Q. B. 137.

(2) 8 C. B. 225.

(5) 3 B. & S. 751; 32 L. J. (Q. B.)

(3) 7 D. & R. 131.

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criterion of reasonableness can be applied? Besides, if that were so, the natural words would have been, "delivering between the 17th and 8th inclusive." And, further, it would have been natural for the buyer to say, "Let me have a fixed day, and, instead of saying between the 17th, &c., which you may say would give you four, five, or ten days after, say certainly the 18th or 20th, or some fixed day." Further, if the 17th is not a binding day on the seller to deliver, it can only have been introduced to bind the buyer to receive. But a buyer is only too glad to receive as early as possible, provided payment is not thereby expedited, which I understand is not the case here. The notion of the buyer not having convenience to receive, and that provision was made against his being compelled to do so is, I think, not a practical one.

MARTIN, B. This case was tried before me at the last summer assizes at Manchester. The facts are as follows:—On the 21st of March, 1866, the plaintiffs and defendants entered into a written contract for the purchase and sale of 900 white L cloths of certain lengths and quality, and on certain terms. The term as to delivery was "delivering on 17th April, complete 8th May." No cloth was delivered or tendered upon the 17th April, and on the 18th the defendants wrote that they threw up the contract by reason of a non-delivery on the previous day. The plaintiffs afterwards, and before the 8th May, tendered the whole of the cloths, viz. 250 pieces on the 23rd April, 250 pieces on the 26th, 250 pieces on the 30th, and the remainder on the 3rd May. The defendants refused to accept any of them, and this action was brought to recover damages for the non-acceptance. An attempt was made at the trial to prove a trade custom bearing upon the case, but it failed, and the rights of the parties depend exclusively upon the above facts.

It is quite clear that if the contract did render it obligatory upon the plaintiffs to deliver a portion of the cloths upon the 17th April, the defendants are discharged from it, for the simple reason that the non-delivery on the 17th rendered it impossible for the plaintiffs to perform the entire of their contract, and the defendants were under no obligation to accept a partial performance of it. Speaking technically, the plaintiffs could not prove an essen-

tial averment in their declaration, that they were ready and willing to perform, &c.

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The question therefore, resolves itself into this, did the contract impose upon them this obligation? In my opinion it did, because I think it is expressed in the contract that there shall be a delivery upon that day. The contract is in writing, and the rule of law is that it speaks for itself; it can neither be added to, nor contradicted, nor varied. Again, the construction is to be according to the plain and ordinary grammatical meaning of the words used. It is immaterial whether the mode and times of delivery be important or unimportant, whether they be of the essence of the transaction or not; if a delivery upon the 17th of April be contracted for, no court of law can dispense with it.

If my view of the contract be a true one, according to *Startup v. Macdonald* (1), a delivery or tender before midnight on the 17th would satisfy it, but a tender after that hour would not. Construing the words used by the parties, I think a tender of the whole 900 cloths on the 8th of May would not do. I think the contract contemplated a completion on that day after a previous delivery of part. Again, I cannot think the words can be read as delivery to be made between the 17th of April, and 8th of May, both days inclusive, and that delivery on the 23rd, 26th, and 30th of April, and 3rd of May, would satisfy them. So to hold appears to me to add to, indeed contradict, the words "*delivering on the 17th.*" I think they express that part delivery was to be made on the 17th, and that no judicial construction can dispense with it. It was asked by the learned counsel for the plaintiffs, would a tender of one piece on the 17th have satisfied the contract? I answer no: such tender would have been altogether nugatory and delusive; the delivery to satisfy the contract would in my opinion have been a reasonable quantity having reference to the entire bulk, and to the interval of time between the 17th of April and 8th of May, and this of necessity would be a question for the jury. On the other hand it was argued by the counsel for the defendants that a delivery on the 17th might have been of essential importance, as the cloths might have been intended for shipment in a vessel chartered to sail on the 18th. I

(1) 6 Man. & G. 593.

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do not attach consequence to this argument. I confine myself to the construction of the writing. It was alleged to be a case of mean repudiation, prices having fallen; it may be so, but I think it better that a shabby defence should prevail, than a loose construction be put upon a written mercantile contract, the inevitable consequence of which is uncertainty, litigation, and expense.

PIGOTT B. The parties to this suit had entered into a contract, partly written and partly printed, on March 21st, for the sale and purchase of 900 pieces of cloth; and the stipulation for the delivery was this: "Delivering on April 17; complete 8 May." No goods were delivered on the 17th, and on the following day, the 18th, the defendants, without making any demand, wrote to rescind the contract. The plaintiffs tendered a number of pieces on the 23rd, and on other days, and the residue on the 3rd of May; all which were refused by the defendants. The plaintiffs contended, first, that the agreement as to delivery was not a condition precedent; and secondly, that the meaning was that they should have the whole period for delivering, from the 17th to the 8th inclusive. The defendants' contention was: first, that the time for delivering was an essential part of the contract, for a breach of which they were entitled to cancel it; and in this it is enough to say that I hold that they were right. But secondly, they contended that the omission to deliver a substantial part "on the 17th of April" constituted such breach, inasmuch as the expression "*on the 17th*" must be taken to shew that a part delivery was contracted to be made *on* that day.

Between these conflicting views we have to decide, and to say what is the true meaning to be attached to the language of the contracting parties as understood by both of them. There is a canon for construing a contract laid down by Parke, B., which I think applicable to the present case. He says: "It ought to receive that construction which its language will admit and which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent." (1)

(1) *Ford v. Beech*, 11 Q. B. at p. 866.

Now, in the present case, the parties have, for the sake of brevity, expressed their meaning imperfectly and ungrammatically, and have clearly left part of it to be implied (whatever construction we may adopt), unless we were so to construe it as to confine the delivery to the two named days, excluding the intermediate period altogether, which is the literal construction. But neither party has contended for this view, and it is evident, upon the whole, that it was not their intention. Then there are the two alternatives presented to us by the parties, and I adopt that of the plaintiffs as the true one. I see no probability in the suggestion that importance was attached to an indefinite part delivery on the 17th, any more than to that to complete the delivery being confined to the last of the days named. Had such been the intention I should have expected that some quantity would have been specified as the first instalment; as either, that it should be a sample only, or a substantial quantity; but on this the contract is wholly silent. The defendant, however, relies on the words "*on the 17th;*" and if it had stopped there the matter would have been plain enough, and the whole delivery would necessarily have been on the day named. But the words which follow must be read, and then we find that a period of time consisting of several days is added to the first day, for the purpose of delivering the goods, but without saying what quantity is to be delivered on the first or on any other day, or if any part need be delivered on any given day after the first; thus leaving it to be inferred, as I think, that the vendor might select which part he shall deliver at any period, so as he shall perform his contract, completing the whole delivery by the later day, inclusive. The object of the parties seems to me to have been to fix a period for the completion of the contract, and this they have done by naming the first and last days of that period; so that the buyer could not demand, nor be bound to receive, any part before the 17th of April; and the seller was bound to deliver all between the fixed days. It was said that this construction gives no effect to the first day named, and that it would have been sufficient for the accomplishment of this object to name one day by which it was to be completed. But I can understand that the buyer may have no convenience for warehousing, or may have wished to avoid the labour and expense of removing,

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and with some such view may have desired to have the goods not earlier than the 17th of April, and not later than the 8th of May; and this is what in substance I think he has contracted for. The term of credit throws no light on the matter, as we are told that it is unaffected by either construction. For these reasons I think the plaintiffs are entitled to the verdict, and that the rule should be discharged.

KELLY, C.B. This was an action for not accepting goods, and the question is whether, according to the terms of the contract, the plaintiffs were bound to deliver some portion of the goods on the 17th of April, 1866.

The contract, as proved, consisted of a note upon a printed form, filled up in writing, headed: "To Messrs. Coddington and Sons. Copy of order contracted with you this day." And after other stipulations the paper was as follows: "Delivering on April 17th; complete 8th of May." The word "delivering" is in print, the rest in writing.

It is upon the words, "Delivering April 17th; complete 8th of May," that the question turns.

The rule of construction applicable in general to all written contracts is, that they are to be construed according to the real intention of the parties, to be collected from the language they have used; that effect is to be given, if possible, to every word used, and that every word is to be interpreted according to its natural and ordinary meaning, unless such construction would be contrary to the manifest intention of the parties, or would necessarily lead to some contradiction or absurdity. But this rule, though applicable to contracts in general, must be received with some qualification, when the contract or a portion of the contract in question consists of an incomplete sentence, ambiguous in its terms, and upon which a literal construction of every word would either be impracticable, or would leave the contract indeterminate and uncertain. And such is the case with the contract in question, which I think is to be construed according to what we can collect to have been the substantial intention of the parties, applying our common sense, and such knowledge as we may possess, to the language in which they have expressed themselves.

Upon this principle, I think that the real meaning of the provision in question was, that the period for the delivery of the 900 pieces of goods was to begin on the 17th of April, and end on the 8th of May, both days being inclusive; that this period was agreed upon as convenient to both parties, for the delivery by the vendor, and the receipt or acceptance by the vendee; that the contract is satisfied by the delivery of the whole quantity between the 17th of April and the 8th of May inclusive, in such portions and at such intervals as a jury might think reasonable with reference to the nature and effect of the whole contract. It follows, therefore, that it was not necessary to begin the delivery on the 17th of April, any more than to finish it on the 8th of May.

It was suggested in argument that the defendants might have required a part delivery on the 17th of April, in order that they might immediately send samples to their correspondents; and no doubt this reason, or other reasons, might have existed for requiring a specific delivery on that day. But, if such had been the case, it is probable that the parties would have so expressed themselves in terms not to be misunderstood, and would not have contented themselves with the mere following up of the usual printed form—which seems to provide generally for the period of delivery—without a specific stipulation that there should be a part delivery on the first and on the last of the days in such period.

I am of opinion, therefore, that the plaintiffs were entitled to the verdict, and that the rule should be discharged.

*The Court being equally divided,
the rule dropped.*

Attorneys for plaintiffs: *N., C., & C. Milne, for Bateson Wood, Manchester.*

Attorneys for defendants: *Reed, Phelps, & Sedgwick, for Sale & Co., Manchester.*

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LORD LECONFIELD *v.* DIXON AND OTHERS.*Inclosure Acts—Game—Reservation of Exclusive Right of Shooting—Construction.*

By a private inclosure act an allotment was directed of certain waste lands; by s. 24 the mines, &c., under the allotments were not to be taken into the valuation of the allotments, they being reserved to the lord; by s. 32, subject to the reservations in the act, the allotments were to be the freeholds of the allottees; by s. 34 it was provided that the lord should have, &c., "all rents, &c., piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered as game, &c., and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances," in as ample a manner as they are now, or have been heretofore used, exercised, and enjoyed by him, or as he "might or could have held, used, &c., the same" in case the act had not been passed; that section contained no reference to mines, but s. 35 reserved them to the lord, with certain powers of search and working. Before the act there was no right of free warren in the lord:—

Held, that the act did not confer on or reserve to the lord an exclusive right of sporting over the allotments.

Ewart v. Graham (7 H. L. C. 331) distinguished.

ACTION for disturbing the plaintiff's exclusive right of sporting over certain land. The defendants denied the right.

There was also a count for disturbing the plaintiff's free warren, but it was admitted at the trial that there was never any free warren in the land, and that count was abandoned.

The plaintiff was devisee for life of the manor of Croglin, under the will of the Earl of Egremont, who was lord of the manor at the date of the inclosure act referred to below; the defendant Dixon was the present owner of an allotment made under that act.

The Great Croglin Inclosure Act (48 Geo. 3, c. 47, of the private acts) was passed in the year 1808, and applied to Croglin manor and to other manors in the parish of Great Croglin.

By s. 20 (p. 14 of the private act) the commissioners were directed to allot to the earl and his heirs a certain proportion of the waste lands of Croglin manor, "as a full compensation for the right and interest of the said Earl of Egremont, as lord of the said manor, in and to the residue of the said open commons and waste grounds, and his right over the same (save and except as hereinafter excepted, and hereby reserved to him or them)."

Section 21 (p. 15) provided for an allotment to the rector for tithes, and s. 22 (p. 17) for the allotment of the residue of the waste lands to the earl, the rector, and the persons entitled to rights of common, &c., over the waste.

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By s. 24 (p. 18) it was provided that, "the mines, minerals, and metals, and all stones and fossils lying under any of the allotments of the said open commons and waste grounds, to be made in pursuance of the act, shall not be taken into the valuation of such allotments, it being intended that all mines, &c., within or under the whole of the said open common and waste grounds" (with the exception of certain quarries and of loose stones) "shall be, and hereby are, expressly reserved to the lords of the said manors respectively for the time being;" and by s. 32 (p. 24) that the allotments should be estates of freehold in the allottees, "but subject and without prejudice to the right of the said lords of the said manors respectively for the time being, to the mines, minerals, stones, fossils, royalties, liberties, privileges, powers, and authorities, or any of them hereby reserved to him and them."

Section 34 (p. 25) provided that "nothing in this act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said lords of the said manors respectively for the time being, of, in, or to the seignories or royalties, franchises and liberties, incident and belonging to the said several manors; but the said lords of the said several manors for the time being shall at all times for ever hereafter have, hold, take, and enjoy all rents, fines, suits, and services to or at the lord's courts, perquisites, and profits of courts, and suits and services to the lord's mill, *piscaries, fishing, hunting, hawking, fowling, and all beasts and birds considered as game*, goods, and chattels of felons and fugitives, felons of themselves and put in exigent, deodands, waifs, estrays, forfeitures, escheats, and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances whatsoever (except such as are expressly taken away by this act), in the same and as full, ample, and beneficial manner, to all intents and purposes, as they are now held, taken, and enjoyed, or have been anciently or heretofore used, exercised, and enjoyed by the present or any former lord or lords of the said manors respectively, or as he, she, or they, or any of them, might

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or could have held, used, exercised, received, taken, or enjoyed the same, in case this act or the said recited act (41 Geo. 3, c. 109) had not been made."

Section 35 (p. 25) reserved to the lords of the manors all the mines, quarries, &c., within or under the lands to be allotted, with powers for searching for and working the same; and s. 37 (p. 26) gave to the owners of allotments certain limited rights of getting freestone, &c., on their allotments.

The cause was tried before Lush, J., at the Cumberland summer assizes, 1866, and a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter a verdict for them, on the ground that the right claimed by the plaintiff was not reserved to him by the Croglin Inclosure Act. A rule having been obtained accordingly,

Nov. 15. *Manisty, Q.C.*, and *Kemplay*, shewed cause. They relied upon *Ewart v. Graham* (1), which overruled or qualified *Greathead v. Morley* (2); and they distinguished *Bruce v. Helliwell* (3), on the ground that it was there found as a fact that, "as owner of the soil," the lord had at and before the passing of the act the free and exclusive right and liberty of killing game. This was held by the Court to shew that the right was included in the rights of ownership of the land which were taken away and for which compensation was given, and that the right reserved must therefore be restricted to seignorial rights. They also referred to *Robinson v. Wray* (4), and contended that if the right reserved were seignorial only, the clause would be useless, inasmuch as there was no free warren here.

Temple, Q.C., and *Jones, Q.C.*, in support of the rule, contended that the case was not governed by *Ewart v. Graham* (1), since the decision in that case proceeded on the ground that the reservation of mines was made in the same section that reserved the right of sporting; the latter right was therefore taken to be ejusdem generis with the mines, that is a territorial, and not a seignorial, right. Here, however, the mines were reserved by a different section; the other rights included in the section were clearly

(1) 7 H. L. C. 331.

29 L. J. (Ex.) 297.

(2) 3 Man. & G. 139.

(4) Law Rep. 1 C. P. 490.

(3) 5 H. & N. 609; see p. 618,

seignorial, and the right of sporting must be of the same order. With respect to the argument that if the right of sporting reserved were only seignorial, the reservation would be idle, inasmuch as no free warren existed, the same was certainly true of many of the rights reserved, and the whole clause must be read as put in *ex majori cautelâ*, and with the addition of the words "if any." They relied on *Bruce v. Helliwell* (1) and *Greathead v. Morley* (2), contending that the latter case was not overruled by *Ewart v. Graham*. (3)

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Cur. adv. vult.

Feb. 12. CHANNELL, B., read the judgment of the Court (Kelly, C.B., Bramwell, Channell, and Pigott, BB.) prepared by

BRAMWELL, B. We are of opinion that this rule should be made absolute. In considering the statute on which the question turns, it is not to be treated as one which is for the benefit of the commoners only, nor as one which takes from the lord only. It is, as is recited, and as we know, as much for the benefit of the lord as of the commoners; it takes indeed from him, so it does from them, and it gives to both. But it should be remembered that the right now claimed by the plaintiff is inconsistent with the useful design of the statute; which was that the lands affected should be held in severalty, with a plenary proprietorship, unfettered by the rights of others over them. There is no doubt that this is most for the public interest. If the plaintiff's claim is well founded, there is no use to which the defendant can put his lands without their being subject to that claim. He could not build a house and have a garden or lawn without the privacy of the occupier being liable to invasion by the plaintiff in search of game. No doubt, if those under whom the plaintiff claims bargained for this at the time of the inclosure, he would get less land allotted to him, and the commoners more, on account of the diminished value of their allotments owing to this burthen, and consequently in law and justice the plaintiff ought to have what he claims. But, on the other hand, if there was no such bargain, and if, in considering what the commoners were to have, it was assumed that their

(1) 5 H. & N. 609; 29 L. J. (Ex.) 297.

(2) 3 Man. & G. 139.

(3) 7 H. L. C. 331.

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allotments would not be subject to this burthen, and less was allotted to them, and more to the lord, in consequence, then the plaintiff is asking for what in law and justice he ought not to have. There seems good reason for supposing that this is so, if, as the defendant says, this supposed right has never been claimed for fifty years. And the statute itself countenances the notion, for by the section at the bottom of p. 18 (s. 24) it is enacted, that mines and stones under the allotment shall not be taken into the valuation of such allotment; but there is no clause that the allotments should be valued as if burthened with the right of sporting. Still, right or wrong, if the statute gives it to the plaintiff he must have it.

Now, if it does, it is by the section at p. 25 (s. 34), for without that it is clear the soil would be taken from the lord and vested in the commoner, with all the incidents of proprietorship. Then, has that section such an operation? If I had my own judgment alone to trust to, I should say clearly not. The burthen of proof, or the burthen of exposition, is on the plaintiff. It is for him to shew that the clause gives the right, not for the defendant to shew that it does not. The defendant might content himself with saying, as we do, that no argument has been used to shew that the clause has such an effect. But we go further, and think we can shew negatively that it has not. It is emphatically a saving clause; put in to prevent questions being raised, such as whether by the operation of such and such an enactment such and such a right is taken away. It begins by saying: "nothing shall defeat, &c., lessen or prejudice the rights, &c., of the lord to the royalties, &c., incident, &c., to the manors." This would not give the right contended for. But the clause proceeds, "but, &c.," and no doubt what follows that word may be more extensive than what precedes, though presumably it says now affirmatively what before it said negatively, namely, "he shall enjoy what shall not be defeated." The clause says, "but the lords shall have, &c., the things enumerated, and all other royalties, &c., in the same manner as they are now or have been enjoyed by the lords of the manors, or might be if the act had not passed." Now, if there had been no particular things named, but only the general words "all royalties, liberties, privileges, &c.," it is clear the clause would not give this right of

sporting, as it is clear it would reserve only rights belonging to the lords of the manor as such. What difference, then, does it make that the particular words are introduced, "piscaries, fishing, hunting, hawking, and fowling, and all beasts and birds considered as game"? We say, none. They are in the middle of a clause which says negatively, the rights of the lord shall not be lessened, and proceeds to say affirmatively, "but certain rights and other rights of the lord shall be enjoyed." Both the beginning and end of the clause clearly deal with the rights of the lord as such, and so we say does the middle. The argument for the plaintiff is, what effect have these words unless that which is contended for? This is a good argument where applicable, but it is not applicable here. For this reason: the same question might be put as to all the other words. Can it be contended that the clause makes any rent fines, &c., payable, which otherwise would not be so? or that the lord will have by virtue of it any felon's chattels and deodands which he would not otherwise have? Further, the clause itself speaks with uncertainty, for it says, "have been," or "might or could have been," held or enjoyed. The same operation should be given to each and all the words, and no greater to one set than to another. Further, the words are erroneous, if used to confer such a right as the plaintiff claims. The lords are to enjoy "piscaries, &c. and all beasts and birds considered as game, &c., and all other royalties, liberties, privileges, franchises, pre-eminences, jurisdictions, and appurtenances." The lord had no royalty, liberty, privilege, franchise, pre-eminence, jurisdiction, or appurtenance, of shooting game over this land; no more than he had of shooting rabbits, or planting trees, or cutting gorse, provided he did not interfere with the commoners' rights. His right was that of owner of the soil. This section supposes other rights. If by these words the right of shooting game is reserved to him, then by the words "other royalties, &c." he has the right of shooting rabbits, and doing other things he could do as owner of the soil, which is absurd. Moreover, where it is intended to give him a right which he possessed as owner of the soil, and would not have unless it was expressly given to him, as mines, it is not done in the section in question (s. 34), but is done in clear and proper language in the next section (s. 35), and provisions are made for his enjoyment of them. It is said that *Ewart v.*

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Graham (1) is an authority for the plaintiff. By that authority we are bound, and, we repeat, convinced, by its arguments. But we think it no authority for the now plaintiff. Indeed, it seems to us against him, because of the reasoning that was there used. The present case wholly differs from *Ewart v. Graham*. (1) There is no mention of allotments in the clause now relied on, as in *Ewart v. Graham* (1), nor does the clause contain any reservation of mines, as in that case. We must say here that it is for the plaintiff to shew how it is an authority, and we have heard no argument to make us think it so. On the other hand, the case of *Greathead v. Morley* (2) so differs from this as not to govern it, though some of the reasons there used may be applicable here. — We think the defendants entitled to judgment.

Rule absolute.

Attorneys for plaintiff: *Jennings, White, & Buckston, for S. & S. G. Saul, Carlisle.*

Attorneys for defendants: *Nicol & Son, for Cant & Fairer, Penrith.*

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STAFFORDSHIRE BANKING COMPANY, LIMITED *v.* EMMOTT.

Debtor and Creditor—Deed under s. 192 of Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—Deed containing Release not Pledged—Estoppel—Effect of s. 198 in Preventing Process from being Available.

The defendant, having had the opportunity to plead to an action a deed under s. 192 of the Bankruptcy Act, 1861, omitted to do so, and judgment was recovered against him; a fi. fa. being afterwards levied on his goods, he sought to avail himself of the protection of s. 198, which enacts that, after notice of the registration of such a deed, process shall not be available.

Held, per Kelly, C.B., and Pigott, B., that he could do so; per Bramwell and Channell, BB., that he could not.

Whitmore v. Wakerly (3 H. & C. 538) and *Hartley v. Mare* (19 C. B. (N.S.) 85) considered. (3)

IN this action, under the Bills of Exchange Act, 1855, the defendant obtained leave to appear and plead; on the 24th of October, the declaration was delivered; on the 7th of November the defendant pleaded never indebted, and on the same day he and

(1) 7 H. L. C. 331.

(2) 3 Man. & G. 139.

(3) See *Braun v. Weller*, Law Rep. 2 Ex. 183.

his partner executed, and on the 8th of November registered, a deed under s. 192 of the Bankruptcy Act, 1861.

The deed was made between the debtors of the one part, and all their creditors, joint or separate, of the other part, and, in consideration of a composition of 1s. in the pound secured by the deed, the creditors absolutely released the debtors from their debts, both joint and separate. The deed was assented to by the statutory number of creditors. Notice of the deed was sent by post to the plaintiffs on the 7th of November, and the deed was gazetted on the 9th.

On the 8th of November issue was joined; on the 13th the cause was tried as undefended, and the plaintiffs obtained a verdict; they afterwards signed judgment, and issued execution. On the 16th the sheriff seized the defendant's goods under a *fi. fa.*

The defendant took out a summons at chambers to set aside the execution, and on the 20th of November, Martin, B., dismissed the summons, with leave to the defendant to apply to the court, the defendant to mould the rule as he might be advised.

A rule having been obtained accordingly (1),

Nov. 25. *H. James* shewed cause. The point raised on this motion has been already decided in *Whitmore v. Wakerly* (2), where this Court decided that a debtor who could have pleaded the release in the deed to the action cannot afterwards take advantage of the deed under s. 198. *Hartley v. Mare* (3) has been supposed to be in conflict with that case, but it is not so in fact; the application in *Hartley v. Mare* (3) was by the inspectors under the deed, who had never had an opportunity of pleading it, and who were not therefore affected by the rule that a release must be taken advantage of on the earliest opportunity. (4) A practical injustice

(1) The rule was moved in the same form as the summons—that is, to set aside execution—but on the argument it was, by the permission of the Court, altered to the form of a rule directing the sheriff to withdraw.

(2) 3 H. & C. 538; 34 L. J. (Ex.) 83.

(3) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

(4) It was also assumed in *Hartley v. Mare* that the application was different from that in *Whitmore v. Wakerly*, and was not, therefore, governed by that case (see per Erle, C.J., 19 C. B. (N.S.), at p. 93; 34 L. J. (C.P.) at p.

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would be caused by allowing the debtor to pursue this course, for if he had pleaded the deed he would have entitled the plaintiff to costs up to the date of the plea. It amounts to little less than a fraud on the plaintiff to allow him to incur the additional expense of going on to judgment.

Anstie, in support of the rule. The cases of *Whitmore v. Wakerly* (1) and *Hartley v. Mare* (2), though capable of distinction, are substantially at variance, and the latter case supports the application in the form in which it is now made. Of the two cases, *Hartley v. Mare* (2) is the later, and appears to have been the most fully argued; and, on the other hand, *Whitmore v. Wakerly* (1) was decided before the case of *Clarke v. Williams* (3) in the Exchequer Chamber had settled that a deed under the Bankruptcy Act, 1861, not containing a release or an equivalent provision, cannot be pleaded in bar. The decisions in *Clarke v. Williams* (3) and *Hartley v. Mare* (2), taken together, shew what is the true view of the design of the act. The statute, providing for a public notice of the registration of the deed, enacts that on the fulfilment of that condition, no process shall be available against the debtor or his goods. The creditor may be entitled, as was said by Erle, C.J., in *Hartley v. Mare* (2), to go on to judgment, but he proceeds at his peril; he cannot make process available, and of this the 198th section, and the advertisement in the *Gazette* gives him notice. The effect, then, of the deed in preventing process from being available is derived solely from s. 198, and from the due execution and registration of a valid deed under the act, with notice; it is not the result of the deed containing a release, but follows, whatever may be its form or contents, so long as it is a valid deed. This is the mode provided by the statute for effectuating deeds made in pursuance of it, and the provision is to be carried out by motion, and not by pleading, which was evidently not in the

188); but, on examining the Master's books, it was ascertained that the application in *Whitmore v. Wakerly* was that "the sheriff withdraw from possession," and not "that the execution be set aside." The reports in 3 H. & C. 538, and 34 L. J. (Ex.) 83, differ on this point; and in deciding the case of

Hartley v. Mare, the Court of Common Pleas had only the latter report before them.

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.
(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

(3) 3 H. & C. 1001; 34 L. J. (Ex.) 189.

contemplation of those who drew the act. But where, on the other hand, a deed under the act can be pleaded at all, it is so pleaded by virtue of its being a release at common law; the only part which the statute contributes to that defence is, that after the execution of the deed by the statutory number, the non-assenting creditor is bound as if he had executed, and it is only to this extent that it is pleaded as a deed under the act. The defendant, therefore, is not now availing himself of the same defence that he would have availed himself of in pleading the release, and it would be as unreasonable to refuse this application as if the release had been contained in a separate deed. The application, therefore, of the rule relied upon by the plaintiffs fails.

But, further, to refuse the relief asked for is contrary both to the words of the section and to the intention of the act. The words are imperative and unqualified, and neither make any distinction between deeds which contain a release and those which do not, nor say anything about the persons making the application. It is not to be assumed that the debtor is the only person benefited by the act, the provisions of which are intended for the benefit of the creditors, and are so described; and—whoever makes the application—it is, in fact, made not in the interest of the debtor alone, but of his creditors. They have assented on the assumption that the deed they have executed will be really carried into effect, and the benefit they stipulate for usually depends on its fulfilment. The creditor, therefore, who is bound by the deed, and whom the statute places in the same position as if he had executed it, is acting in fraud of the rest of the creditors in seeking to obtain an additional advantage. But the act points out his true remedy. If there is in fact any good reason why he should be allowed to proceed, he may apply to the Court of Bankruptcy for leave, and in considering that application the Court will be able to examine whether there are any circumstances that entitle him to exception from the general prohibition, or whether the other creditors will be prejudiced by his proceeding. If he declines to make use of that liberty, and proceeds on his own responsibility, he cannot justly complain of being restrained in a course which he adopted at his own risk after due notice, nor of costs which he has wilfully incurred.

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February 12 The following judgments were delivered:

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KELLY, C.B. The plaintiffs having issued execution upon a regular judgment obtained in this action, the question is, whether the defendant is entitled to a rule upon the sheriff to withdraw from possession, on the ground that he had caused to be duly registered a deed of composition valid within the 192nd section of the Bankruptcy Act, 1861, but which, inasmuch as it contains a release, might have been but was not pleaded in bar to the action.

This question is of the highest importance, for it arises almost from day to day in one or another of the superior courts, or before a judge at chambers. Two of the superior courts are at variance upon the point; this Court having decided in *Whitmore v. Wakerly* (1), that where the debtor has omitted to plead the deed as a defence to the action, when it might have been so pleaded, the statute becomes inoperative, and the Court will not relieve the defendant from the execution; and the Court of Common Pleas in *Hartley v. Mare* (2), having held that the execution could not be made available without leave of the Court, notwithstanding the defendant had failed to plead the deed by way of defence, when it might have been pleaded.

Under these circumstances we are called upon to determine this question, which directly arises in the present case; and I am of opinion that the statute is positive and imperative, and that the Court is bound to relieve the defendant or his effects against this execution, whether he shall have had the opportunity, or, having had it shall have availed himself of it or not, to plead the deed by way of defence to this action.

The general intention of the legislature (in introducing this entirely new provision into the law) appears to have been to enable a debtor, with the assent of a specific majority of his creditors, to bind the entire body by a deed of composition or inspectorship, or in trust for creditors, and to carry the provisions of the deed into effect for the benefit alike of himself and of his creditors, by protecting his person and his property against all debts and liabilities whatsoever incurred before the execution and registration of the deed. To effect this purpose, the 192nd section

(1) 3 H. & C. 538; 34 I. J. (F.x.) 83.

(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

points out the several descriptions of deeds that may be entered into, and the conditions upon which they are to become valid and binding upon the whole body of the creditors, while the 197th and 198th sections confer jurisdiction upon the Court of Bankruptcy over all parties to the deeds, and all who are bound by them, and extend an ample protection to the person and property of the debtor, whilst the deed is in operation and fulfilling its destined purpose. The language of the 198th section is positive, clear, and absolute, save that the protection granted is made subject to one condition or qualification. It is expressly enacted and ordained by the legislature that no execution shall be available against the person or property of the debtor unless by leave of the Court, which has been held to mean the Court of Bankruptcy; and the construction put upon this clause in many unquestioned decisions has been, that the Court or a judge is bound upon motion or summons to relieve the debtor against all executions if the deed be valid and duly registered. Upon what ground, then, can we be called upon to introduce a condition or restriction, which the legislature has not thought fit to impose, upon the exercise of the authority or the discharge of the duty of the Court? and that by reason only of a rule of law, or rather a rule of practice, which has prevailed reasonably and justly with regard to the course of procedure in a suit at law, but which would defeat the undoubted intentions of the legislature if applied to this special prohibition to take a debtor or his property in execution, and can have no application at all to a great variety of cases which arise under this act of parliament. If the legislature had intended that these deeds should be pleaded by way of defence to actions by creditors, it is presumable that a summary and concise form of plea would have been given, by which the debtor might at once have stopped all actions, as he may now relieve himself upon motion from all executions. It is manifest that the legislature had no intention to interfere with any action by a creditor against a debtor, until the creditor should attempt to issue execution against the person or the property of the debtor. The deeds contemplated by the statute are of many kinds. Some of them may contain a release, which, not by force of the statute but at common law, would be a defence to an action. Other deeds, though they may provide for the

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forbearance by the creditor to interfere with the carrying on of his trade, or the continuance in possession of his effects on the part of the debtor, nevertheless contain no express stipulation which would be pleadable in bar of an action. Other deeds, again, though they may contain a release, make it to operate only upon payment of the instalments of a composition; and there are many which, though containing an immediate release, make it void upon the failure by the debtor or his surety to pay the full amount of the composition agreed upon, or upon some other contingency which may or may not arise. Yet in all these cases, without distinction, the legislature has expressly enacted that no execution shall be available against the person or the property of the debtor. How, then, can it be contended that the statute has any regard to the pleadings or other proceedings in an action, when we find it thus provided that, whether the deed shall be such as to furnish a defence to an action or not, the creditor is in all cases forbidden to avail himself of any execution?

The well known doctrine touching an *audita querela*, or the rule of practice under which relief may be obtained upon motion where the writ would lie, treated of in *Wms. Saunders*, vol. ii. p. 148, in the note to *Turner v. Davies*, has really no application whatever to this question. The writ will not lie, and relief upon motion will not be granted to prevent execution, where the matter relied on might have been pleaded as a defence to the action; but here, it is the release which might have been pleaded, and it is not the release, but a valid deed not merely executed but registered within the statute, and which may not, and in many cases does not, contain any release at all, or any other matter of defence pleadable, upon which relief is sought against an execution. What possible injustice can a creditor sustain by a decision that his debtor is in no case bound to plead a deed of this nature as a defence to an action? Supposing the deed valid and a defence, if pleaded it will prevent both judgment and execution; if not pleaded, the plaintiff will obtain his judgment, but cannot proceed to execution. If the deed be invalid and no defence, whether pleaded or not, the plaintiff will be entitled both to judgment and execution. It is suggested that if such a deed be pleaded as a defence arising after action brought, the plaintiff may admit the plea and take

judgment for his costs to the time of pleading. If the law be that under such circumstances he could issue execution for his costs, the law would work great injustice to an insolvent debtor, and pro tanto defeat the intention of the statute, which was to protect his person and his property against execution by reason of any debt or liability antecedent to the registration of the deed. The costs of an action, and still more probably of several actions, might be of so large an amount as, if enforced against the debtor's property, materially to interfere with, perhaps altogether to defeat, the arrangement provided by the deed; and thus a creditor, or a small number of creditors, though bound by the terms of that arrangement, would have it in their power to nullify it altogether, and contrary to the spirit at least of the contract into which they will have entered, or by which they will have become bound, to sweep away the whole effects of the debtor, to the prejudice, not only of the debtor, but of all the rest of the creditors. But I am of opinion that the law is otherwise, and that whether the deed be pleaded or not, a plaintiff's costs to the time of registration, accruing in any action already brought, constitute a liability within the 192nd section, and are proveable together with the debt itself under the deed.

Again, an honest debtor has no motive, and may not desire to plead a deed, or to incur the smallest costs in any action by a creditor, so long as he is secure against executions, and so enabled to wind up his affairs in the manner agreed upon by his creditors. Then a creditor, although precluded from issuing execution, may yet reasonably desire to have a judgment, even where there is a release in the deed, in order that he may be able, if the deed should prove abortive, as by nonpayment of the composition, or failure to carry on the business under inspection, or even the absconding of the debtor, to enforce his debt at once; or if, as would probably be the case, the estate of the debtor should come to be administered in the Court of Bankruptcy, to place himself in the most advantageous position among the other creditors. But if with any other view, why should he be permitted, much less forced on by the debtor himself, to proceed? Upon notice of the registration of the deed he knows he cannot proceed to execution. If then, unless for some such purpose as before pointed out, he pro-

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ceeds at all, he acts at his peril, and ought not to be entitled to any costs which he may have incurred, or to any benefit which he could possibly derive from his judgment. It is indeed difficult to imagine a case in which, if full effect be given to the statute upon a literal as well as substantial construction of its language, any prejudice can arise to any single creditor from the omission of the debtor to plead a deed of composition. If a creditor thinks fit to proceed to judgment, and by reason of any contingencies rendering the deed abortive, as above pointed out, justice should require that the protection extended to the debtor and his property should cease, it is always open to him to apply to the Court of Bankruptcy, which, as before observed, has jurisdiction alike over debtors and creditors, and all other parties to such a deed, for leave to issue execution. The statute gives effect to these deeds, and protects the person and property of the debtor, not for the sake of the debtor alone, but for the benefit of the whole body of creditors under the arrangement which the great majority of them have sanctioned, and of which they will be deprived unless the statute be strictly observed, and the effects of the debtor protected against executions. Why, then, should the creditors be deprived of this benefit by the negligence, if negligence it be, of the debtor, to which they are no parties, and which they have no power to prevent? Nor must it be forgotten that the sheriff who puts an execution in force, whether against the person or the property of the debtor, is bound, upon the production of the certificate of registration, which operates as a protection in bankruptcy, to release the debtor or withdraw from the possession of his property. How is he to inform himself whether the defendant might have pleaded the deed as a defence to the action, and has failed to do so?

Upon the ground, then, that the language of the statute is imperative and clear, and that the legislature has made no distinction between cases in which a deed may or may not be pleaded, or has or has not been pleaded, by way of defence to the action, I am of opinion that the Court is bound to extend to the defendant the protection which the legislature has conferred upon him, and that the rule that the sheriff do withdraw from possession should be made absolute.

BRAMWELL, B. I am of opinion that the plaintiffs are entitled to judgment. It is established beyond question that a deed such as this may be pleaded in bar of the maintenance or further maintenance of an action such as this; and that if this deed had been perfected before this action, the action might have been barred by pleading it. It is said that a defendant has in addition the right to let the action proceed to judgment, and then set up the deed in bar of the execution. It must be admitted that this would be an anomaly; the rule being that defences must be pleaded at the time for pleading, or as soon after as they arise, or the benefit of them will be lost. And it must be admitted that, not only would an anomaly be created, but great inconvenience and injustice; for a plaintiff would be put to all the expense of an action prolonged to judgment, needlessly and fruitlessly. It is said that the plaintiff should not sue nor proceed with his action, knowing of such a deed. To this there are many answers. The plaintiff may not know of it. He may desire to contest its validity. His own debt may be disputed. He is entitled, if the deed is pleaded in bar of the further maintenance of the action, to confess it, and get his costs up to that time; but this he cannot do unless it is pleaded. If the defendant is right in his present contention, he will have to pay no costs; but if he had pleaded, as he might, he would have had to do so. So that the more costs he puts the plaintiffs to, the less he pays himself. If it is said the plaintiff's remedy is to apply to the Court, he could not then get his costs. Besides which, he is entitled to try the validity of the deed by the ordinary tribunals for the trial of a cause of action and an alleged defence. And I doubt if "the Court" can be applied to when the deed is invalid. (1) But it is said that the words of s. 198 are express. It seems to me that, however plain, they must be so construed as not to give rise to the mischiefs I have pointed out. But in fact they must be qualified for another reason. If the clause "after notice of filing such deed has been given as aforesaid, no execution, &c., in respect of any debt, &c., shall be available," were applied according to its very words, it would follow that where there was a deed in 1865 and a debt in 1866 no execution could issue for it. Again, the

(1) See, however, *re Tresidder*, Law Rep. 1 Ch. Ap. 21, and the cases in Bankruptcy there cited.

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execution may be on a judgment for a debt, or on a judgment for a tort. If before the deed, such judgments would be debts, and entitled to dividends; if after, they would not be debts so entitled; and yet, according to the very words of the section, no execution is to be available, and consequently the person entitled to the judgment would get neither dividend nor execution. The words therefore must be qualified at least thus: "No execution in respect of any debt that might be proved under the deed." But the judgment debt for debt and costs cannot be proved under the deed, for the judgment did not exist at the making of the deed; and it might be that the costs added to the debt would alter the proportions, and prevent there being three-fourths in value of assenting creditors. I say, then, that the words do not necessitate the mischief the defendant contends for. The clause is satisfied by holding it to mean that, where there is a judgment that can be proved, and afterwards a deed perfected, no execution shall issue, or having issued shall be proceeded with.

It is said there are some deeds which, though within the statute, furnish no defence to an action, and therefore this clause must be acted on in such cases after judgment, and consequently in all other cases. It is true there are such deeds, but the consequence does not follow. There can be no deed which not only does not protect the debtor's property by operating directly on it, but at the same time does not protect it and the debtor's person indirectly by furnishing a bar to an action. Such a deed would be nugatory. It would be a deed which in no way restrained the creditor, nor protected the debtor nor his property, and therefore would be inoperative and idle. But no doubt this might be a reasonable deed of assignment of the debtor's property without more, and it is said that as such a deed could not be pleaded, then, unless this clause applies after judgment, the person of the debtor and his after-acquired property would be liable. I ask, why not? It is to be remembered that these deeds are matters of agreement; and, if the debtor does not choose to ask for protection against this, or the creditors do not choose to grant it, why should the law do so? Let us suppose the possible case of an honest debtor unable to pay, wishing his creditors should divide his property equally, but not desiring to protect his person or future property. Can he not

so arrange? It probably would be admitted he could do so, by stating in the deed that his person and after-acquired property were *not* to be protected. But why are he and his creditors to say there shall be *no* such protection? That is the law, unless they say that there shall be. The affirmative statement is necessary, not the negative. And this suggests another argument. The rights of debtor and creditor are matters of agreement. Why is this defence, depending on agreement, to be treated differently from any other depending on the same? Further, why is the debtor differently situated to a man who has his discharge in bankruptcy? The true way to consider these deeds is to consider them as valid against assenting creditors at common law, and, by force of the statutes against dissenting creditors, to the same extent and no more. This appears by s. 192, which says that they "shall be as valid and effectual and binding on all the creditors as if they were parties to and had duly executed the same." That is all. These plaintiffs are not differently situated from a creditor party to the deed. Suppose that an assenting creditor had gone on with his action, alleging that his consent had been obtained by fraud, or for some other reason, must not the defence have been pleaded? If not, why? It would be a common law defence, not one by the statute. If the deed must be pleaded to an action by such a creditor, why not to an action by this creditor, as to whom the deed is only *as* valid, binding, and effectual, as if he had been a party to it? It is said that if the plaintiff had been taken on a *ca. sa.* he must have been at once discharged. I say "no." The words of the statute are unfortunate in likening the certificate, which is of permanent, to a protection which is of temporary, operation. But it is clear that, if a judgment were got on a debt which accrued after the deed, the certificate would not be a protection against a *ca. sa.* Nor would it in the present case. It is only a protection when the judgment is before the deed.

With respect to the authorities, there is one in point in this court, which has been repeatedly acted upon, at chambers at least (1), and, with great respect, I prefer it to *Hartley v. Mare*. (2) That case was rightly decided, if it was rightly taken that the money was

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(1) *Whitmore v. Wakerly*, 3 H. & C. 538; 34 L. J. (Ex.) 83.

(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

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the money of those to whom it was ordered to be paid, and was paid into court to prevent their goods being sold : see per Byles, J., 19 C. B. (N.S.) p. 94. But no doubt the reasons given would apply to the present case in favour of the defendant. But, I say it with greatest respect, the only argument used by the Chief Justice is, "the words are general, and we are bound to give effect to them according to their plain meaning." And the same remarks may be made on the judgments of the other learned judges. With submission, I think there is a great deal more for discussion in the question. My judgment is for the plaintiffs.

There is another point. If this execution is wrongful, let the defendant try it in the ordinary way. Let him bring an action against the sheriff or execution creditors. Why is the Court to interfere in this summary way, especially as there is a difference of opinion? The defendant's case is—you, the plaintiffs and the sheriff, have no right to seize or continue in possession of these goods. If so, an actionable trespass or tort is committed. When A. complains that his goods have been taken under a judgment against B., he brings his action; and the same remark is true of a false imprisonment. This is the same. I think the rule ought to be discharged on this ground, even if the defendant were otherwise right.

CHANNELL, B. In this case, the question for our decision is substantially the same as in *Whitmore v. Wakerly* (1), in this court. It is suggested that *Hartley v. Mare* (2) is inconsistent with that case. It seems to me, however, that the two cases are perfectly consistent, and both rightly decided.

In *Whitmore v. Wakerly* (1) we gave effect to the principle of law that a defendant cannot, in order to set aside an execution, avail himself of anything which would have been a defence to the action, and which he had the opportunity of pleading. The old authorities as to this are collected in the notes of Wms. Saunders, vol. ii. p. 148; and, on consulting the original authorities there cited—Sir Thomas Raymond (3) and Salkeld (4)—it clearly appears, as

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.

(3) *Day v. Guildford*, Sir T. Raym.

(2) 19 C. B. (N.S.) 85; 34 L. J. 19.

(C.P.) 187.

(4) *Wicket v. Creamer*, 1 Salk. 264.

might, perhaps, have been assumed without any such research, that the principle alluded to is founded on the doctrine of estoppel. Where a man lies by, and allows his opponent to alter his position by incurring costs on the faith of his not possessing, or that he has abandoned, any defence but those of which he avails himself in the ordinary manner, he cannot afterwards set up a defence which he has thus induced his opponent to suppose either that he does not possess, or that he has abandoned. It is not, therefore, enough of itself to say that the words of this statute have conferred some immunity and protection on the debtor; it is necessary to see, also, whether, as between himself and his adversary, he may not have precluded himself from setting up that which he would otherwise have been entitled to do. In *Whitmore v. Wakerly* (1) we were asked to set aside a *fi. fa.*, on the ground that the applicant had executed a deed. We refused, because we thought the applicant had, by his conduct, precluded himself from setting up that deed as against the judgment creditor. In *Hartley v. Mare* (2) money had been paid into court, and the Court of Common Pleas were applied to by inspectors under a deed to have it paid out to them. They said, this money really belongs to us on behalf of the creditors; we have had no opportunity of setting up our claim before, and have in no way precluded ourselves from setting it up now; as between ourselves and the judgment creditor, the money ought rather to belong to us than to him. The Court, as I think, very rightly granted the application. In the present case the application is made to us by the defendant in the original action, the person who had the opportunity of pleading the deed and did not do so; and I think that, as between himself and the plaintiffs in the action, he has precluded himself from setting up the deed, and from asking us to put in force in his favour the 198th section of the Bankruptcy Act. I quite agree that the legislature might have enacted that this doctrine of estoppel should not apply; but I see nothing to lead me to suppose that they have done so. Looking fairly at the whole scope of the sections relating to these deeds of arrangement, it seems to me that the object was to effect by private arrangement between

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the creditors, and upon their own terms, the same thing as might have been effected by a bankruptcy. I can see nothing that shews any intention that a debtor should have more protection under one of these deeds than if he had obtained his discharge in bankruptcy. If he had done that, he would have to plead it in an action against him to which such a plea applied, or if he did not, he could not afterwards avail himself of it to avoid execution. I agree also that, if this doctrine of estoppel applies, the intention of the legislature that the assets shall be distributed as equally as possible amongst the creditors may be defeated. This, however, can only take place where there is no assignment of the debtor's effects; for wherever there is an assignment, of course the assignee may step in and say, "The goods seized are mine, and not the debtor's," and so defeat the execution though the assignment has not been pleaded.

It is clear that the present deed would have been pleadable in bar, and that the defendant had an opportunity—not a bare possibility, but a reasonable opportunity—of adopting the ordinary course of proceeding and pleading it, but did not do so. I think, therefore, that, as between the parties before us, the deed cannot be set up, and that the rule obtained should be discharged.

PIGOTT, B. This was an application to set aside an execution on the defendant's goods under s. 198 of the Bankruptcy Act, 1861, on the ground that he had executed a deed of composition under the 192nd section after action brought. The dates of the proceedings shew clearly that the defendant could have pleaded the deed to the action; and the only question is this, whether by the omission to do so, he is deprived of the benefit (under the 198th section) of staying this execution. The case of *Whitmore v. Wakerly* (1) in this court, and *Hartley v. Mare* (2), in the Court of Common Pleas, are really in conflict upon the subject, although the latter court, having before them only the report of the former case in the *Law Journal Reports*, thought otherwise. We are therefore called upon to review these decisions, and to determine which we will follow. The decision in this court rested

(1) 3 H. & C. 538; 34 L. J. (Ex.) 83.

(2) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187.

on the well established principle of law, that where a defendant has an opportunity of pleading a defence to an action, he must do so, or lose the benefit of it. The decision in the case in the Common Pleas proceeded upon the very general and comprehensive language of the section of the act of parliament, which certainly in terms includes all executions in respect of "any debt," words which, beyond doubt, when read with reference to the 192nd section, mean any debt to which the deed applies. Now, it is true that the section does not notice expressly the rule of law above referred to; but if the full and ordinary meaning is to be given to its language, its necessary effect would be to abrogate that rule in cases to which these composition deeds apply; and in my opinion that must be taken to have been the intention. It may have been thought that all the creditors would have notice of the deed directly, or by means of the *Gazette*, and so would not proceed; or it may be that the legislature had no intention of dealing with actions or pleadings at all, but matters of bankruptcy and courts of bankruptcy only. But whatever may have been the view of the legislature, as to which it is needless to speculate, it certainly has employed language in the enactment which affects the rule by necessary implication. It is clear that there are cases in which a deed could not be pleaded at all, and where therefore the creditor would be entitled to go on to judgment and to issue execution; but, by reason of the 198th section, could not avail himself of the execution without leave of the Court. Such was the case of *Clarke v. Williams* (1); and the section in question makes no distinction between such cases and cases where the deed is pleadable; and we cannot, therefore, apply consistently a different construction to the same words, to suit various kinds of deeds. The intent of the act of parliament seems clearly to be, that where such a deed has been duly executed and registered, a certificate should operate in all respects as a discharge under a bankruptcy; nor will any injustice be done to the creditor as to the costs incurred before registration, for under the debtor's liability under the 192nd section they may be added to the debt, and any claim made under the deed. I think, also, that the former decision in this court would lead to much inconvenience in the execution of writs

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(1) 3 H. & C. 1001; 34 L. J. (Ex.) 189.

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by the sheriff. He can only see the certificate of registration, and must act upon it at the time of arrest, and when he has no opportunity of knowing whether the deed was pleaded or pleadable in the action. He might, in case of mistake, not be held liable, as in *Lloyd v. Harrison* (1); but it is hardly likely that the legislature meant to place him in the position of having to execute process without the means of knowing whether it be legal or illegal. There was no leave of the Court of Bankruptcy, in fact, for issuing this execution, and I am therefore of opinion that we ought not to limit the language of the legislature by a forced construction, but must decide, according to its plain terms, that the certificate operates as a protection in bankruptcy against this execution.

*The Court being equally divided,
the rule dropped.*

Attorneys for plaintiffs: *W. H. Duignan, for Duignan & Lewis, Walsall.*

Attorneys for defendant: *Hare & Whitfield, for Heywood, Manchester.*

(1) Law Rep. 1 Q. B. 502.

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXX VICTORIA.

BLACKMORE *v.* YATES.

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Railway Company—Assignment of Rolling Stock—Illegality—Lloyd's Bond.

April 17.

A railway company gave a Lloyd's bond to their contractor, who handed it to the plaintiff to secure an advance of 10,000*l.* then made to him by the plaintiff. The plaintiff having, in the name of the obligee, brought an action against the company upon the bond, it was compromised before judgment on the terms that the company should transfer to him the whole of their rolling stock as security. The rolling stock was transferred accordingly, but was subsequently seized by the defendant, an execution creditor of the company. On the trial of an interpleader issue between the plaintiff and defendant:—

Held, first, that no evidence was admissible to impeach the original legality of the bond; and, secondly, that the conveyance of the rolling stock by the company to the plaintiff was valid as against the defendant.

THIS was an interpleader issue, directed to try whether the property in the rolling stock of the Wrexham, Mold, and Connah's Quay Railway Company, was in the plaintiff as against the defendant.

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The cause was tried by Mellor, J., at the last Liverpool spring assizes, when the following facts were proved:—

In the month of June, 1865, the company gave a "Lloyd's" bond to their contractor, Mr. Piercy, for 10,000*l.*, which he afterwards assigned to certain persons trading under the name of Broun, Shipley, and Co., for an advance of 10,000*l.*, made by them to him on the security of the bond. The plaintiff, who is an attorney, having, on behalf of the lenders, commenced an action in the contractor's name against the company, it was compromised before judgment upon the terms that the company should transfer to the plaintiff, as trustee for the lenders, the whole of their rolling stock, to secure the sum advanced. The defendant was an execution creditor of the company, and had seized their rolling stock subsequently to its transfer to the plaintiff. At the trial, it was proposed to shew that the Lloyd's bond was illegal, as having been given, not for work done by the contractor, but for money lent by him to the company. (1) The learned judge, however, refused to admit any evidence on this point, holding that the original validity of the bond could not be disputed in this action. He considered that the only question was whether the transfer of the whole of their rolling stock by the company to the plaintiff was or was not ultra vires and invalid. A verdict was, under these circumstances, entered for the plaintiff, with leave to move to enter it for the defendant, or a nonsuit.

Quain, Q.C., moved accordingly, or for a new trial, on the ground of the improper rejection of evidence. First, the evidence as to the original illegality of the bond should have been received. If it had been proved that the bond had been given for an illegal purpose, the compromise of an action founded upon it would have been founded on no good consideration. Secondly, the company had no power to assign all their rolling stock to the plaintiff. They are carriers, and as such have certain privileges conferred on them by act of parliament, and it is only on the condition that they maintain themselves in a position to work their lines that they can lay claim to those privileges: *South Yorkshire Railway and River Dun Company v. Great Northern Railway Company*. (2)

(1) See *Chambers v. The Manchester and Milford Railway Company*; 33 L. J. (Q.B.) 268.

(2) 9 Ex. 55.

KELLY, C.B. Without giving any opinion on the absolute right of a railway, under all circumstances, to convey away the whole of their rolling stock, whilst the railway is in operation, I am of opinion that in this case the company were justified in doing so. This was an interpleader issue to try the question of property in the rolling stock. The plaintiff, it seems, had commenced an action against the company, on behalf of those beneficially interested in a Lloyd's bond; and the defendant likewise had commenced proceedings against the company. The plaintiff compromised his action before judgment, and, in consideration of his so doing, the company transferred the rolling stock to him by way of security. The defendant, on the other hand, issued execution. Now, I think that the company had, under these circumstances, the same right to give the rolling stock to the plaintiff, who, upon obtaining it, forewent the judgment he would otherwise have obtained, as the defendant would have had to take it in execution if it had been left untransferred on the company's line. This being so, I think the learned judge properly excluded all evidence as to the circumstances under which the bond was originally given. Whatever they may have been, the plaintiff having commenced an action, and being in a condition to obtain judgment, and the company having consented to transfer the rolling stock to him without his carrying his action to a termination, the conveyance as between these parties was, in my opinion, founded on a good consideration. This rule, therefore, must be refused.

MARTIN, B. I am of the same opinion. I do not say that the shareholders of a railway company might not, under some circumstances, stop the transfer by the directors of the rolling stock on the line; or that the Attorney General, as the representative of the public, might not step in to prevent such a course being taken. But this is a question between two creditors of the company, and one with which neither the public nor the shareholders have anything to do. The plaintiff, or those for whom he was trustee, had actually advanced 10,000*l.* to the company. He afterwards brought an action on the bond given for that advance, and forbore to proceed with it to judgment, upon the company giving him their rolling stock as a security. The defendant is another creditor of

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the company, and having taken proceedings to recover his debt, issued execution. Then, as between these two creditors, I think the plaintiff had, under these circumstances, as good a right to the rolling stock as the defendant.

BRAMWELL, B. I am of the same opinion. Whatever the value of the bond might have been in the hands of the original obligee, in the hands of the plaintiff, who is the lender, or trustee for the lender, and who is not alleged to have had notice of the circumstances under which the bond was originally given, it furnished a good cause of action; and the agreement between the plaintiff and the company, therefore, is not void for illegality.

Rule refused.

Attorneys for defendant: *Marshall, Westall, & Roberts.*

April 18.

WALKER v. THE GREAT WESTERN RAILWAY COMPANY.

Railway Company—General Manager—Authority to bind Company to pay for Surgical Attendance on Injured Person.

The general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance, bestowed at his request, on a servant of the company injured by an accident on their railway.

Cox v. Midland Counties Railway Company (3 Ex. 268) considered.

THIS was an action brought to recover compensation from the defendants for surgical attendance rendered by the plaintiff to certain persons who, upon various occasions, had been injured on the defendants' railway. The defendants denied their liability.

At the trial before Pigott, B., at the last Worcestershire spring assizes, it appeared that the plaintiff sought, inter alia, to recover 44*l.* 16*s.* for medical services bestowed, under the express authority of the general manager, on a servant of the company who had been injured by an accident on their lines. The jury found a verdict for the plaintiff for the whole amount claimed, and leave was reserved to the defendants to move to reduce the damages.

Huddleston, Q.C., moved to reduce the damages by 44*l.* 16*s.* The general manager had no power to bind the company to pay for medical attendance. In this respect his authority is not more extensive than that of a station-master, who was held to be without such a power in *Cox v. Midland Counties Railway Company*. (1)

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[*MARTIN, B.* When that case was decided, it was generally supposed that a company, except in some very few cases of daily recurrence, could only contract under seal. But there has been much more freedom in this respect accorded to companies since the time of that decision.]

That may have been one ground of decision, but another was the station-master's want of authority to make a contract binding his employers to pay for medical attendance, a matter entirely beyond the scope of his employment.

[*KELLY, C.B.* Surely there is a distinction between the authority which is possessed by a station-master, and that possessed by a general manager.]

Neither of them possess authority to engage a medical man on behalf of the company.

The Court (*Kelly, C.B., Martin, Bramwell, and Pigott, BB.*) held that the general manager had implied authority to employ the plaintiff, and refused the rule.

Rule refused.

Attorneys for defendants: *Young, Maples, Teesdale, & Nelson.*

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April 24.

COWAN v. MILBOURN.

*Illegal Contract—Non-communication of Ground of Refusal to Complete—
Blasphemous Publication.*

The defendant contracted to let rooms to the plaintiff; afterwards, discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book, he refused to allow the use of them, but did not assign this as a reason for his refusal. In an action for breach of the contract:—

Held, first, that the publication of such doctrines was blasphemy, and that therefore the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced at law.

Secondly, that the defendant was entitled to justify his refusal on this ground, notwithstanding his having assigned a different reason.

ACTION (in the Court of Passage, Liverpool) for breach of a contract to let rooms to the defendant. The first and third counts of the declaration related to contracts to let to the defendant the St. Anne's Assembly Rooms, Liverpool, for the purpose of lectures, which were to be delivered there on the 20th of January and the 3rd of February, 1867; and the second count related to a contract to let the same rooms to the defendant for the purpose of a ball and tea-party on the 29th of January.

To these counts the defendant, amongst other pleas, pleaded, fourthly, that, after making the alleged agreements respectively, the defendant was informed, and learned for the first time, that the plaintiff intended (as he did in fact intend) to use the rooms for certain irreligious, blasphemous, and illegal lectures or entertainments; whereupon the defendant, within a reasonable time, after satisfying himself as to the truth of the premises, gave notice to the plaintiff that he could not permit the plaintiff the use of the rooms for the purposes aforesaid, and thereupon notified to the plaintiff not to incur any further or other expense in relation thereto; and in like manner, and within such reasonable time as aforesaid, tendered and paid to the plaintiff the amount of the moneys which the plaintiff had paid him for the intended use of the rooms; and that his refusal to permit the plaintiff under the said circumstances,

and for the said purposes, to use the rooms was the breach complained of.

The defendant, by his seventh plea, also relied upon the provisions of 21 Geo. 3, c. 49, s. 1.

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Issue.

At the trial the following facts appeared in evidence :—

In December, 1865, the plaintiff, who was secretary to the Liverpool Secular Society, hired of the defendant, through defendant's son, the rooms in question, for Sunday, the 20th of January, for the purpose of having lectures delivered there in advancement of the views of the society. He did not communicate to the defendant the subjects of the lectures, nor that they were to be delivered in connection with the society. He afterwards hired the same rooms for the delivery of lectures on Sunday, the 3rd of February, and for a ball and tea-party in memory of Tom Paine, on the 29th of January. On the 5th of January the subjects of the lectures for the morning, afternoon, and evening of the 20th of January were advertised by placards as "The Soul: Its Nature and Destination." "*The Character and Teachings of Christ; the former Defective, the latter Misleading.*" "Bible Morality and Bible Science;" and those of the lectures for the 3rd of February as "The Sceptical Tendency of Bishop Butler's Analogy." "*The Bible shewn to be no more Inspired than any other Book; with a Refutation of Modern Theories thereon.*" "Catholicism, Protestantism, and Secularism: which contains most Truth, and which is best calculated to benefit Humanity?"

On the 17th of January, the plaintiff received from the defendant's son a letter written the day previous, complaining of an evening lecture having been advertised, and alleging that the rooms were only let for the morning and afternoon, but making no complaint of the subject of the lectures; and on the 19th of January the defendant received from the plaintiff's attorney a letter of that date, entirely refusing the use of the rooms, but not assigning any reason. The plaintiff, having attempted without success to obtain possession of the rooms on the days in question, brought this action for breach of the several contracts.

It appeared upon the evidence of the chief constable of Liverpool, who was called for the defendant, that the defendant's refusal

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was caused by his interference, and by his threatened opposition to a renewal of the licence attached to the rooms.

The learned judge ruled that the lectures announced were blasphemous and illegal, and that the plaintiff could not therefore recover on the agreement for the Sundays (20th of January and 3rd of February), but that he might recover on the agreement relating to the tea-party of the 29th of January; and a verdict for one farthing damages was found for the plaintiff on the second count, and a verdict was entered for the defendant on the first and third counts, with leave to the plaintiff (under 16 & 17 Vict. c. xxi. s. 45) to move this Court to enter a verdict for the plaintiff for 10*l.* on each of those counts.

Littler moved accordingly. First, the allegation of blasphemy in the plea is not proved, for the only evidence of the character of the lectures is that afforded by the advertisements, which shew nothing falling within that description. The test of blasphemy lies rather in the manner than the matter of what is said, and the current opinion in modern times has been that to support a prosecution for blasphemy there must be a scurrilous and indecent attack upon commonly received opinions, or a maintenance of views flagrantly opposed to ordinary morality. This is the view expressed in Blackstone's Commentaries, vol. iv. p. 51 (1), and the same opinion is stated at length in Starkie on Libel, 1st ed. pp. 496-7, cited and adopted in Russell on Crimes, 4th ed. vol. ii. pp. 334-5; and it is stated to the same effect, though in somewhat different terms, in the 2nd edition of Starkie, vol. ii. pp. 146-7. (2)

(1) "Though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate."

(2) The passage in the earlier edition of Starkie, pp. 496-7, cited in Russell on Crimes, vol. i. p. 334, is as follows: "It may not be going too far to infer from the principles and decisions, that no author or preacher who fairly and

conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such cases the broad boundary between right and wrong; and thus, if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil ten-

That opinion is further supported by the remarks of Best, J., at the close of his judgment in *The King v. Waddington*. (1) If this is so, it follows that a lecture of this nature is not illegal.

[BRAMWELL, B. Not so; an act may be illegal in the sense that it will not be recognised by the law as capable of being the foundation of any legal right, or that it may even deprive what it accompanies of that capacity, although it is followed by no penalty. The very point was illustrated by the case of *Pearce v. Brooks* (2) in this court.]

So far as relates to the subject of the character and teaching of Christ, the Act of relief of 53 Geo. 3, c. 160, s. 2, exempts the plaintiff from the charge of illegality.

[BRAMWELL, B. Only from the penalties imposed by 9 & 10 Wm. 3, c. 32, and from the penalties and disabilities to which Unitarians still remained subject in consequence of their exclusion from the benefits of the Act of Toleration, 1 Wm. & M. sess. 1, c. 18, s. 17.]

With respect to the lecture on the authority and inspiration of the Scriptures, it can scarcely be said to be illegal to question their

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dency, if the matter published contain any such tendency, the publisher becomes answerable to justice."

The passage in the later edition, vol. ii. pp. 146-7, is as follows: "The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so long as they are honest ones. . . . It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A ma-

licious and mischievous intention, or (what is equivalent to such an intention in law as well as in morals) a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication—from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons and subjects—that the design of the author was to occasion that mischief to which the matters which he publishes immediately tends—to destroy, or even to weaken, men's sense of religious or moral obligations—to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt—the offence against society is complete."

(1) 1 B. & C. 26, at p. 28.

(2) Law Rep. 1 Ex. 213.

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exclusive inspiration after the decision of the Privy Council in *Bishop of Salisbury v. Williams*. (1)

[BRAMWELL, B. The act of 53 Geo. 3, c. 160, does not repeal that part of 9 & 10 Wm. 3, c. 32, s. 1, which is directed against those who "shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority," and who shall on indictment or information be convicted thereof.]

It has not been commonly supposed that the recent attack on the Pentateuch by Bishop Colenso laid him open to such an indictment.

Secondly, the plea is not proved, because the reason alleged in it was not the reason given by the defendant when he refused the use of the rooms.

KELLY, C.B. It would be a violation of duty to allow the question raised to remain in any doubt. That question is, whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His teaching, that the first is defective and the second misleading, is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms. It is contended that this was not the real motive which actuated the defendant, and that the evidence shewed another and different motive, and that this reason was put forward only as an excuse. But I am of opinion that, whatever may have been the motive operating on his own mind, it was open to him by law, at the last moment before the rooms had been taken possession of, to refuse their use, and to justify that refusal on the ground that the plaintiff had in fact this purpose in view.

(1) 2 Moore, P. C. (N.S.) 375.

MARTIN, B. I am quite of the same opinion. I protest against the notion that this is any punishment of the persons advocating these opinions. It is merely the case of the owner of property exercising his rights over its use.

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BRAMWELL, B. I am of the same opinion, and I will state my grounds. I think that the plaintiff was about to use the rooms for an unlawful purpose, because he was about to use them for the purpose of, "by teaching or advised speaking," "denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority." That he intended to use the rooms for the purposes declared by the statute to be unlawful is perfectly clear, for he proposed to shew that the character of Christ was defective, and His teaching misleading, and that the Bible was no more inspired than any other book. That being so, his purpose was unlawful; and if the defendant had known his purpose at the time of the refusal, he clearly would not have been bound to let the plaintiff occupy them, for, if he would, he would then have been compelled to do a thing in pursuance of an illegal purpose. Neither if he had let the plaintiff into possession could he, for the same reason, have recovered the price for their letting. It is said, he did not know of this purpose, or, at least, did not regard it, and gave another and different reason. But, having refused to let the rooms, he might justify it on any ground that would support the refusal. This is laid down in *Spotswood v. Barrow* (1), where in an action for wrongful dismissal the defendant justified on the ground that the plaintiff had misappropriated moneys, and the Court held that the plea was supported, although the defendant failed to shew that the fact was known to him before he dismissed the plaintiff. Rolfe, B., there says (2): "The subject may be illustrated by what was said in *Doe d. Daniell v. Woodruffe* (3), viz. "where a party having a right of entry enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or no, by virtue of every

(1) 5 Ex. 110.

(2) At p. 113.

(3) 10 M. & W. 608, at p. 632.

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title which he had in him, and which he could assert by entry. Littleton, s. 695, is there referred to; and that old authority seems to me to be founded on very good sense." This appears to me to be good law, and the reason of it is apparent. You need give no reason at all. If you refuse to perform your contract, and the other party asks why, you may say, "Go to law and I will tell you." And your justification will depend on whether in fact and law he could compel you to perform. Now it appears that the plaintiff here was going to use the rooms for an unlawful purpose; he therefore could not enforce the contract for that purpose, and therefore the defendant was not bound, though he did not know the fact. It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law. The rule must be refused, and I do not regret the result, and on this ground, that this placard must have given great pain to many of those who read it.

Rule refused.

Attorneys for plaintiff: *Duke & Goffey, Liverpool.*

ELLIOTT v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

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May 1.

Insurance—Fire Policy—Arbitration Clause—Condition precedent and collateral Covenant—Construction.

In a policy of fire insurance entered into by the plaintiff with the defendants the covenant for payment was made subject to certain articles; one of which provided that, on a loss occurring, the assured should within fifteen days send in particulars of his loss, "which loss or damage, after the same shall be adjusted, shall immediately be paid in money by" the defendants, with an option to them to reinstate, and a proviso that "in case any difference shall arise touching any loss or damage, such difference shall be submitted" to arbitrators, "whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of his claim." In an action brought on this policy to which the defendants pleaded this article, and that the plaintiff had not submitted the matter to arbitration:—

Held on demurrer (Bramwell, B., dissenting), that the covenant was only a covenant to pay the adjusted loss, and that the plaintiff had no cause of action.

DECLARATION on a policy of fire insurance under seal, by which the defendants "declared that the capital, stock, estates, and securities of the defendants should be subject and liable to pay, make good, and satisfy to the plaintiff, any loss or damage by fire to the goods aforesaid, which should or might happen on or before the 24th of June, 1867, not exceeding the sum of 2200*l.*, according to the exact tenour of the articles thereunto subjoined;" alleging a loss to the full amount.

Plea, that one of the articles subjoined to the policy (article 10) was of the tenour and effect following: "All persons assured by this corporation are, upon any loss or damage by fire, forthwith to give notice thereof to the office in London, or to the known agents of the said corporation, and within fifteen days after such fire, deliver as particular an account of their loss or damage as the nature of the case may admit, and make proof of the same by their oath or affirmation, and that of their domestics or servants, and by their books of accounts, or such other proper vouchers as may be required; which loss or damage, after the same shall be adjusted, shall immediately be paid in money by the said corporation, without any deduction; or they shall at their option forthwith provide or supply the assured with the like quantity and quality of goods with those burnt or damaged by fire; or at the expiration of sixty

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days after notice of the said fire, they shall expend in rebuilding or repairing any building damaged or destroyed by fire the sum assured thereon, under the direction of able and experienced workmen, if the loss and damage shall, in their opinion, amount thereto. In case any difference shall arise touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of claim;" alleging that the loss sued for had not been adjusted according to the articles, that a difference arose between the plaintiff and the defendants touching the alleged loss, which the defendants had always been willing to refer in the manner mentioned in the articles, whereof the plaintiff had notice, but that the plaintiff refused, and that the difference had never been submitted to arbitration, nor the alleged loss or damage adjusted.

Demurrer and joinder.

Lumley Smith (Mellish, Q.C., with him), in support of the demurrer. The provision relied upon by the defendants is no bar to this action, but is only a collateral covenant, on which, if it is broken, they can sue. According to the decisions of *Scott v. Avery* (1), and *Horton v. Sayer* (2), the question in such cases is, whether the provision is a condition precedent to the right to payment, or is only a collateral covenant; and in order to bring the case within the first class, it is necessary that there should be words clearly expressing such an intention. In *Scott v. Avery* (1), there were such words, for the contract not only provided that the loss should in the first instance be ascertained by the committee, and that if a difference should arise between the committee and a member the matter should be referred to arbitration, but it was further provided, as "part of the contract of insurance between the members of this association," that no member refusing to accept the amount of any loss as settled by the committee should be entitled to maintain any action at law or suit in equity, until the matters in dispute had been arbitrated upon, and then only for the

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

(2) 4 H. & N. 643; 29 L. J. (Ex.) 28.

sum awarded, and the obtaining the decision of arbitrators was declared to be a condition precedent to the right of any member to sue. But if, as in *Horton v. Sayer* (1), the contract is not drawn in this form, but only contains a collateral covenant, it cannot oust the jurisdiction of the courts of law. In the case of *Braunstein v. Accidental Death Insurance Company* (2), although there were no negative words, the covenant was only to pay such sum "as should appear just and reasonable . . . such sum to be ascertained in case of difference," as provided in the conditions; until ascertainment, therefore, there was no cause of action. But here there are neither negative words, nor is the sum to be paid made dependent upon its ascertainment by adjustment or arbitration; but the agreement is, to pay the loss, with an independent provision for settling the amount. The case rather resembles that of *Roper v. London* (3), where the words were identical with those here used, except that there was an independent clause (cond. 10) to the effect that the loss should be paid immediately after the same should have been established to the satisfaction of the directors. But that clause is of precisely the same effect as the words here, "which loss or damage, after the same shall be adjusted, shall be immediately paid;" they have relation only to the time when the payment is to be made. The decision there was, that the provision was only a collateral stipulation, and where the natural effect of the words is the same, the fact of their being put in the same or a different clause cannot alter their construction. If the clause were that the amount of the adjusted loss should be paid, and no method were provided for adjustment, the plaintiff would not be precluded from suing; but the article at any rate says no more than this, for the words as to adjustment have no reference to the subsequent clause relating to differences; they do not say "adjusted as herein-after provided;" and, therefore, all they can be taken to mean is, that there shall be an attempt at a settlement between the parties. This clause was drawn long before the decision in *Scott v. Avery* (4) had shewn the possibility of a valid arbitration clause, and must be

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(1) 4 H. & N. 643; 29 L. J. (Ex.) 28.

(2) 1 B. & S. 782; 31 L. J. (Q.B.) 17.

(3) 1 E. & E. 825; 28 L. J. (Q.B.) 260.

(4) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

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taken to have been framed with reference to the then state of authority, and without the intention of binding parties conclusively in this mode. Had they intended to avail themselves of the privilege which *Scott v. Avery* (1) secured for them, the defendants should have framed their policy anew upon that case, as was done in the policy sued upon in *Braunstein v. Accidental Death Insurance Company*. (2) The defendants had their true remedy, which was to apply for an order of reference, on the delivery of the declaration, under 17 & 18 Vict. c. 125, s. 11.

[BRAMWELL, B. Suppose the plaintiff made a claim to which the defendants agreed, that would be an adjustment. But suppose the plaintiff afterwards clearly proved that he had omitted some article, could he recover for its value? It appears to me it was not intended to exclude him, but if so, adjustment must be only evidence.]

This would be in accordance with the view taken of adjustment clauses in *Arnould Ins.* (3rd ed.) vol. ii. p. 998, and the case there cited of *Luckie v. Bushby*. (3) The effect of that case is that adjustment is only evidence for the jury, and that the assured can sue for unliquidated damages.

Hawkins, Q.C., in support of the plea. It is not denied by the plaintiff that the contract, construed according to the defendants' construction, would be lawful; and it is certainly beneficial. The purpose is to ascertain, independently of all other questions relating to the liability of the company, the actual amount of loss suffered by the assured, and which is a matter that a jury can never satisfactorily determine. No wrong or injustice is, therefore, done to the plaintiff; and if the words bear the meaning contended for by the defendants, there is no reason why effect should not be given to them. Now, the agreement sued on clearly incorporates the articles by reference, stipulating that the loss shall be paid for according to their exact tenour; and the article set out in the plea in substance describes the adjusted sum as the sum to be paid to the assured. The words, "after," &c., shew that the adjusting is a condition precedent to the right to sue, and bring

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

(2) 1 B. & S. 782; 31 L. J. (Q.B.) 17.

(3) 13 C. B. 864; 22 L. J. (C.P.) 220.

the case within the decision of *Scott v. Avery*. (1) The authority of *Roper v. Lendon* (2), which is cited in support of the plaintiff's contention, is weakened by the fact that there was no discussion upon the plea raising this question, but that point was abandoned in the argument, the more readily, perhaps, because of the other plea, on which judgment was given for the defendants, and which went to the whole action. On the latter point the Court held that the delivery of particulars was a condition precedent; and that decision is supported by *Mason v. Hervey* (3), and is in favour of the defendants. But, further, the application of *Roper v. Lendon* (2) to the case fails, on account of the absence of any separate clause here answering to the 10th condition in that case. *Tredwen v. Holman* (4) is a recent authority in the defendants' favour. It is true that the policy there contained the clause that no action should be brought until the arbitrators had given their decision; but if there are words sufficient to indicate that this is the intention of the parties, it is not necessary to have an express negative. And, upon the other hand, *Horton v. Sayer* (5) shews that the mere presence of such negative words will not of itself aid the defendants, since they did not there avail to prevent the Court from deciding in the plaintiff's favour. The real question is, whether, on the whole, taken together, the intention is apparent to make a reference a condition precedent.

Lumley Smith, in reply.

KELLY, C.B. The question in this case is, whether the plaintiff is entitled to recover the amount of a loss by fire which he has suffered, and for which he claims to be compensated under a policy effected with the defendants, such loss not having been adjusted as pointed out in the articles subject to which the policy was made. The form of the policy is a covenant, by the defendants, that their capital, stock, &c., shall be subject to make good the plaintiff's loss, not exceeding the sum of 2200*l.*, "according to the exact tenour of the articles thereunto subjoined."

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

(2) 1 E. & E. 825; 28 L. J. (Q.B.) 260.

(3) 8 Ex. 819; 22 L. J. (Ex.) 336.

(4) 1 H. & C. 72; 31 L. J. (Ex.) 398.

(5) 4 H. & N. 643; 29 L. J. (Ex.) 28.

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If the sentence had stopped at the figures 2200*l.*, and in a subsequent part of the instrument there had been independent provisions which might be supposed to have qualified these words, it might have been a question of greater doubt, whether those provisions were to be held a condition precedent, or a collateral stipulation which could not avail to oust the jurisdiction of the Court. But the covenant is itself, in its very terms, qualified and made conditional by the subsequent words referring to the articles, which, following without any interval, form an integral and substantial part of the covenant. Therefore, in order to ascertain whether, where a loss has been sustained by the insured, a right of action has accrued to him, we must look at the articles "according to the exact tenour" of which the insurance is to be paid. Now, the 10th article provides that, upon the occurrence of any loss or damage by fire, the party is forthwith to give notice to the office, and within fifteen days to deliver in a particular account of his loss, evidenced and verified as may be required, "which loss or damage, after the same shall be adjusted, shall immediately be paid in money," with an option to the company to reinstate. Collecting the meaning of the parties from the language used by them in this sentence, and putting on it the ordinary and usual construction, the effect is, not that the plaintiff is, in the event of loss, entitled immediately to recover the amount of his loss; but what he is entitled to recover is the amount of the loss after it has been adjusted, which means, adjusted between the parties in the manner pointed out by the subsequent article. It appears to me that to decide to the contrary would be to disregard entirely the obvious intentions of the parties, expressed in words which state emphatically that before the loss is paid its amount shall be adjusted.

We were pressed with the weight of authority, and it was ably argued that it was impossible to decide in favour of the defendants consistently with prior decisions, and with the well recognised principle that no contract shall oust the jurisdiction of the courts of law; and it was urged that the contract was neither more nor less than a contract on the part of the company to make good the loss, with a separate and collateral stipulation that the amount should be referred to arbitration. It is, no doubt, difficult to

reconcile and give effect to two propositions so nearly in direct opposition as that no contract of the parties shall oust the jurisdiction of the courts, and that, on any difference arising between two parties, it shall be referred to arbitration. But the fair result of the authorities is, that if the contract is in such terms that a reference to a third person, or to a board of directors, is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts, or deprive the party of his action. Now it seems to me impossible, without directly overruling or disregarding the decision of the House of Lords in *Scott v. Avery* (1), to say that the stipulation here is not a condition precedent. There the words were, that “the sum to be paid by this association to any suffering member for any loss or damage shall, *in the first instance, be ascertained* by the committee.” Here they are, that the loss, “*after the same shall be adjusted*, shall immediately be paid.” In both cases a stipulation follows, that any difference arising between the parties shall be referred to arbitration. The House of Lords in that case having held that the ascertainment of the loss by the committee or by arbitration was a condition precedent, and that without such ascertainment the plaintiff had no cause of action, I cannot see any distinction which would justify us in holding here that the adjustment of the loss as provided in the articles was not a condition precedent. All the cases cited were in favour of the defendants’ contention with the exception of *Horton v. Sayer* (2) and *Roper v. Lendon* (3), which were both decided on the ground that the agreement to refer was only a collateral stipulation. In the latter case the Court came to that decision on a contract very much resembling the present one. I do not enter into the question whether the true construction was put on the instrument in that case; the point

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(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

(2) 4 H. & N. 643; 29 L. J. (Ex.) 28.

(3) 1 E. & E. 825; 28 L. J. (Q.B.) 260.

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seems to have been given up early in the argument, and the matter was hardly discussed. But on another part of the same contract, words contained in one of several conditions, subject to which the policy was made, were held to constitute a condition precedent, and that part of the decision rather supports our present judgment. This contract, I think, speaks plainly to the effect I have stated, and my judgment, therefore, is for the defendants.

MARTIN, B. I am of the same opinion. It seems admitted on both sides that if on the construction of the contract the parties appear to agree that, before a court of law interferes with the matter, it shall be investigated by another tribunal, in such a manner that the decision of that tribunal is necessarily involved in the matter which the court of law is to adjudicate upon, that stipulation is lawful and must be complied with. But if the contract is merely that, if a dispute arises, it shall be referred to arbitration, without any such provision as I have referred to, it is otherwise; and probably if the stipulation were accompanied by a declaration that no action should be brought, it would be none the more invalid and ineffectual. At least, no case says that the parties may contract that a matter shall never be heard in court, and my impression is, that it would be against the liberty and dominion of the law. If, therefore, the parties have here agreed that it should be necessary before bringing any action that there should be a preliminary inquiry, this condition must be complied with. In construing the contract we must consider what is its nature. It is a policy of insurance, and it is well known to every one that on such a contract there is constantly a dispute as to the value of the articles for which compensation is claimed. It is equally well known that this is a question which a jury cannot try, and that if the matter is allowed to go into court, the parties, after incurring all that expense, may have to go to arbitration. Therefore, assuming the parties to be aware of this, it is the part of wise men to agree that the question of value shall be so determined at the outset. Now, the first stipulation is, that the assured shall within fifteen days send in a particular account of his loss. It seems to me that this is clearly a condition pre-

cedent, and it was so decided in *Roper v. Lendon*. (1) The article then provides for the payment of the money after it has been adjusted, but reserves to the company an option of reinstating or rebuilding; so that we have two provisions, both of which are in the nature of conditions precedent, and there then follows a provision that in case any difference shall arise it shall be submitted to arbitration; and the question is, whether this is of the same character as the others. Treating the question merely as a matter of construction of the words themselves, I do not think the matter quite clear; but, taken in connection with the context, they may well bear the meaning contended for by the defendants. There is one part of the clause which influences me in coming to this conclusion. It is that which provides that "if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of claim." Considering the relation of the parties, this is not an unreasonable stipulation; but unless the defendants' construction is right, the office cannot have the benefit of it, for it only applies to the mode of ascertaining the amount of compensation there provided for.

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BRAMWELL, B. I think the plaintiff is entitled to judgment. I agree that there is no great doubt as to the law, nor did I ever think there was, even before the decision in *Scott v. Avery*. (2) In the argument of that case (the arbitration clause in which was framed by Mr. Justice Cresswell), Mr. Manisty and myself were counsel for the defendants. We scarcely cited a case, but laid down a proposition which was almost immediately adopted by the judges below, and by the House of Lords. That proposition was that if two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For

(1) 1 E. & E. 825; 28 L. J. (Q.B.) 260.

(2) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

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to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in *Scott v. Avery*. (1) Now the construction of this policy appears to me far from clear, upon the point whether the defendants agree to pay the adjusted amount, or whether they agree to pay the actual loss, with a provision for adjusting the loss. If the latter is the true construction, then the principle of *Scott v. Avery* (1) does not apply, or rather it applies to exclude them from their defence. The words of the policy are, that the defendants will pay to the plaintiff "any loss or damage by fire," according to the tenour of the articles. The articles (which are thus part of the covenant) then say "which loss or damage, *after* the same shall be adjusted, shall immediately be paid." To my mind, these words refer not to an essential term of the covenant (which I prefer to the phrase, condition precedent), but to the time when the payment is to be made, that is, immediately after the adjustment. This verbal examination may seem critical, but it is called for ; for if the adjusted loss only is stipulated to be paid, the consequence will be, that if the assured after the adjustment discovers that something has been burned which has been *bonâ fide* omitted from his claim, he will be precluded by this clause from recovering for it. But I do not think that it was in the contemplation of the parties to be so irrevocably bound. If not, then the agreement is to pay, not the adjusted, but the actual amount, with a proviso for settling the matter in case of dispute. The clause goes on to say, that the defendants may at their option restore ; so that it is not merely their intention to pay the adjusted loss. It is then provided that, in case "any difference shall arise touching any loss or damage," it shall be settled by arbitration. Now, it is impossible to say that this is merely a substitute for adjustment between the parties, for under these words the arbitrator would have power, not merely to adjust the amount that shall be paid, but to determine whether the plaintiff shall have any payment at all, or whether by reason of non-payment of premiums or of fraud he has forfeited his right to recover. I think, therefore, that this is a collateral agreement to refer to arbitra-

(1) 5 H. L. C. 811 ; 25 L. J. (Ex.) 308.

tion, and not an agreement that only the adjusted loss shall be paid.

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PIGOTT, B. I agree with the Chief Baron and my Brother Martin. The principle of law is conclusively settled by *Scott v. Avery* (1), and all we have to do is to examine the construction of the document. Now, certainly the articles are incorporated with the policy, for the payment is to be made according to the exact tenour of the articles. We must, therefore, look at the provisions of the 10th article; and I cannot take the view adopted by my Brother Bramwell, that the word “after” shews that the clause has relation only to the time when the loss is to be paid, and thus makes the agreement only a collateral stipulation. I rather think that it points to *what* the office covenants to pay, and that, notwithstanding the use of the adverb of time, the covenant is only to pay the adjusted loss; that there was, therefore, no duty to pay, and therefore no breach of the covenant, until the loss had been ascertained in the manner there pointed out. My Brother Bramwell has dwelt upon the injustice and hardship which might follow from this construction, where the assured has omitted something from his claim. But the same might be said of an action tried out and a verdict given. There must be some time when the rights of parties are conclusively and finally ascertained, and there must, therefore, always be the chance of some loss being suffered by ignorance or carelessness. But we have to inquire what the parties meant by the words they have used, and my opinion is in favour of the defendants’ construction.

Judgment for the defendants.

Attorneys for plaintiff: *Mason, Sturt, & Mason.*

Attorneys for defendants: *E. & W. Richards.*

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

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FALCONAR *v.* McKENZIE.

May 11. *Trader-Debtor Summons—Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 86—Costs—Construction.*

Where a creditor, having taken out a trader-debtor summons against his debtor, and filed an affidavit of debt under s. 78 of 12 & 13 Vict. c. 106, recovers in an action for the debt less than the amount sworn to in the affidavit, and the defendant applies to the Court for an order for costs under s. 86, the Court, on being satisfied of the absence of reasonable and probable cause for swearing to the amount in the affidavit, is bound to make the order, no discretionary power to withhold it being given by the section.

THE plaintiff took out a trader-debtor summons against the defendant, under s. 78 of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), making an affidavit of a debt exceeding 100*l.* for beer supplied. The defendant denied the debt, and the plaintiff brought this action, in which he recovered only 64*l.*, as it appeared that part of the debt was covered by bills still running. A rule having been obtained, calling on the plaintiff to shew cause why the defendant should not have his costs allowed, under s. 86,

Temple, Q.C., and *Gainsford Bruce*, shewed cause. They contended that s. 86 requires two conditions to be satisfied before the defendant can claim his costs: first, "provided that it shall be made appear to the satisfaction of the Court" that the plaintiff "had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid;" and secondly, "provided such Court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant." Admitting that the first condition would be satisfied, they contended that the second made the allowance of costs discretionary in the Court; and they proposed to shew circumstances which made it unfit that the defendant should in this case have costs.

Manisty, Q.C., in support of the rule, was not called on.

BRAMWELL, B. We are both of opinion that we have no discretion in the matter, and that the rule must be made absolute. No doubt the repetition of the word *provided* gives some ground for the plaintiff's contention; but it is evidently used carelessly, and only as making the "rule or order" a necessary condition to

entitle the defendant to his costs, and to the incidental advantages given him by the section; otherwise the act would have said that the costs should be allowed, if it appears to the satisfaction of the Court that there was no reasonable or probable cause for the affidavit, and if (speaking negatively) no reason appears why they should not be allowed. Moreover, the statute has given no rule to guide our discretion. Are we to determine the question by reference to the conduct of the defendant in the action, or in any other matter, or to the fact of one party being rich and the other poor,—or with reference to what circumstances are we to exercise our judgment? In the absence of any indication of such a rule, the words cannot mean more than that the Court, on being satisfied of the first point, shall thereupon allow the defendant his costs.

PIGOTT, B., concurred.

Rule absolute.

Attorneys for plaintiff: *Pattison & Wigg, for J. B. Falconar, Newcastle-upon-Tyne.*

Attorneys for defendant: *J. & J. K. Wright, for W. A. Oliver, Sunderland.*

MILNER v. RAWLINGS.

May 11.

Deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—Execution—Undertaking by Attorney.

The plaintiff issued execution, after notice that a composition deed under s. 192 of the Bankruptcy Act, 1861, was about to be registered by the defendant; the defendant's attorney gave notice of the same fact to the sheriff's officer, who withdrew on having the attorney's undertaking for the amount of the debt and costs, after refusing to withdraw on any other terms. At the time the undertaking was given the deed was in fact registered, and contained a release of all the creditors' "claims and demands." The defendant having paid to the sheriff the amount of the undertaking under protest, and the sheriff having paid the same into court, the defendant moved to have the money paid out to him:—

Held, that the defendant was entitled to the money, inasmuch as the money represented the proceeds of the execution, and the plaintiff was not, at the time the undertaking was given, in a position in which he could have derived any benefit from the execution if it had been proceeded with.

ON the 15th of January the plaintiff commenced this action against the defendant under the Bills of Exchange Act, 1855. On

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the 25th the defendant's attorneys gave notice to the plaintiff's attorneys that the defendant had on that day executed a composition deed under s. 192 of the Bankruptcy Act, 1861; but the plaintiff proceeded with his action, signed judgment on the 29th, and on the same day issued execution. On the 30th the sheriff of Warwickshire levied on the defendant's premises, and advertised a sale for the 1st of February. The defendant's attorneys applied to the bailiff in possession to abstain from selling, but the bailiff declined to do so, unless they would give an undertaking to pay the debt and costs; and accordingly, at about half-past seven P.M. on January 31, they gave the undertaking, and the officer then retired from possession and withdrew the handbills. The deed had in fact been already registered at two P.M. on the same day. It contained a release of "all claims and demands." In pursuance of the undertaking the defendant on the 4th of February paid to the officer the amount of the debt, costs, and poundage, with a protest that the plaintiff was not entitled to the money, and a notice that he should claim to have it returned. The sheriff took out an interpleader summons, on the hearing of which Martin, B., ordered that the sum of 35*l.* 7*s.* 1*d.*, being the amount paid to the sheriff after deducting his fees, should be paid into court; discharged the sheriff; directed that there should be no action; and ordered that the question between the plaintiff and defendant should be brought before the Court on special case or motion.

May 11. *L. Kelly* moved on behalf of the defendant for the payment of the money to him. First, the deed, which contains a release of all claims and demands, and which on its registration bound the plaintiff, was, at the time this undertaking was given, already registered. The plaintiff's execution was therefore gone (the words "claims and demands" being sufficient to release it: *Bac. Abr. tit. Release (I.)*), and there was no consideration for the undertaking. Secondly, the undertaking was obviously meant only to stand in lieu of and to preserve intact the rights of the parties as they existed at the moment when it was made, and it will follow their condition. Now, by s. 197 of the Bankruptcy Act, 1861, after the registration of the deed, all the rights of the creditors are

governed by the rules of bankruptcy. But by reason of s. 184 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), which must, according to the decision in *O'Brien v. Brodie* (1), be construed strictly, and the policy of which is extended by s. 73 of the Bankruptcy Act, 1861, the execution here could not have profited the creditor, since the registration had already taken place when the undertaking was given, and before execution by seizure *and sale*. A sale even on the day advertised would have been too late, and the creditor must have repaid the money.

Macnamara shewed cause in the first instance. Admitting the positions alleged on the other side, the plaintiff is entitled to the money. The defendant must be taken to have paid it when the undertaking was given, and he or his agent then knew the facts, or, which is the same thing, had the means of knowledge; he cannot therefore now recover it back, even though he was not originally compellable to pay it: *Boyle v. Blackstock*. (2) But in fact there was a good consideration for the undertaking, for it purchased the withdrawal of the sheriff, and since at that time neither he nor the plaintiff had notice of registration, the execution was still "available," and the sheriff's act in proceeding with it would have been perfectly legal. In any case, it averted the injury of a sale, which could only have been prevented, if at all, by an application to the Court, and the relief of the defendant from the necessity of making this application was itself a sufficient consideration. But further, this money was paid to satisfy the attorneys' undertaking, and the cases shew that where an attorney has given an undertaking, the Court will enforce it, even though it would not be enforceable as an ordinary contract. Both points are illustrated by *Atkinson v. Bayntun* (3), and *Butcher v. Stewart* (4), where the alleged invalidity of an execution was held to be no answer to an undertaking by which the defendant was released from custody under it. The second is illustrated by *Re Hilliard* (5), where the undertaking was invalid under the Statute of Frauds; and by *Hellings v. Jones* (6), where an undertaking for payment of the plaintiff's costs, given on an agreement being made to enter

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(1) Law Rep. 1 Ex. 302.

(4) 11 M. & W. 857, at pp. 875-6.

(2) 8 L. T. (N.S.) 641.

(5) 2 D. & L. 919.

(3) 1 Bing. (N.C.) 444; see pp. 457-8.

(6) 10 J. B. Moore, 360

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a *stet processus*, was enforced against the attorney, although the defendant died insolvent before taxation or expiration of the time for putting in bail.

BRAMWELL, B. I think this rule should be made absolute; and the conclusion is plain, when we consider who are the parties claiming this money. The one is the plaintiff in the action; he claims money in the hands of the sheriff, and he can only do so on the assumption that it is the proceeds of the execution. Now, suppose the sheriff had returned *nulla bona*, and the plaintiff had brought an action against him for a false return, would not the sheriff have had a perfectly good defence? That return means, in substance, that there are no goods available for the purposes of the execution. If wrong goods were taken by the sheriff, and were sold by him, or their value paid to him, he would be justified in returning the money realized to the person to whom the goods belonged, and in making this answer to the judgment creditor. That is the case here, and, therefore, the return would be perfectly good, and the sheriff would have a complete defence to the action. If this is so, it shews to demonstration that the plaintiff is not entitled to the money. Further, with respect to the point that an undertaking was here given by the attorney, this was done on behalf of his client, though without authority; his client has since ratified his act, and now claims the money which he has paid in pursuance of it; and he is entitled to do so. I am satisfied that, in making this decision, we are doing nothing opposed to the authorities cited to us; we certainly have no such intention.

FIGOTT, B. I am of the same opinion. We must see on what terms this money was paid. If it was paid to release the goods from the execution, then, without reference to what were at that time the rights of the parties, the plaintiff is entitled to it. But, was that the meaning of the transaction? I think not; but rather that the execution debtor by his attorney claimed to be entitled to the benefit of a composition deed already executed and assented to, and then either actually registered or shortly about to be so, and meant to do what he could to try the right in the best and

safest way. He, therefore, deposits the money to abide the event. It now turns out that the deed was already registered, although, owing to the execution being levied in the country, the fact was not known to the parties; so that, if they had merely allowed things to take their course, and done nothing, the sheriff could not lawfully have proceeded with the execution. Our decision that, under these circumstances, the plaintiff is not entitled to the money so paid, I think agrees both with the justice of the case and the intention of the parties.

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Attorneys for plaintiff: *Mackeson & Golding.*

Attorney for defendant: *C. W. Jackson, for Southall & Nelson, Birmingham.*

[IN THE EXCHEQUER CHAMBER.]

May 18.

LORD COLCHESTER AND OTHERS v. KEWNEY.

Land Tax—Exemption—Hospital—Construction—38 Geo. 3, c. 5, s. 25.

In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) is contained an exemption from land tax of "any hospital" in respect of its site.

Commissioners appointed by the Crown to administer a fund subscribed by the public for that purpose, founded, in 1857, an asylum for the maintenance and education of three hundred daughters of soldiers, sailors, and marines, dying in active service. The asylum was built and maintained entirely out of that fund, and solely for the benefit of the children, and was under the control of the commissioners:—

Held, first, that the asylum was not within the exemption in the act, that exemption applying only to institutions and sites existing at the time when the tax was made perpetual.

Secondly, that it was not exempt as Crown property, such exemption depending not on the ownership but the occupation by the Crown.

ERROR on the judgment of the Court of Exchequer, on a special case, raising the question whether the site of the Royal Victoria Patriotic Asylum was liable to the payment of land tax. The Court below held that it was liable, and gave judgment for the defendant. (1)

Sir R. P. Collier, Q.C. (Prideaux, Q.C., with him), for the plain-

(1) Reported Law Rep. 1 Ex. 368.

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tiffs, relied upon the arguments used, and the cases cited, by him below. In support of the first point, that the hospital was within the exemption in the act; he also urged that if the words of exemption did not apply to sites of hospitals becoming such after the passing of 38 Geo. 3, c. 60, the same rule must apply to the words of taxation in 38 Geo. 3, c. 5, s. 1, and it would follow that mines and quarries opened after the passing of the act would not be taxed; and further, that in the exemption clause itself (s. 25), the words relating to classes of persons, such as schoolmasters, &c., must necessarily be taken in the extended sense, which favoured a similar construction of the rest of the section. In support of the second point, that the hospital was exempt from taxation as Crown property, he relied upon the remarks of Bolland, B., and Parke, B., in *Attorney General v. Hill*. (1)

Mellish, Q.C. (*Philbrick* with him), for the defendant, relied upon the arguments used by him below; and, on the first point, further referred to 38 Geo. 3, c. 60, ss. 74, 104, 105, contending that as those sections, in making provision for the future arrangement of the land tax, contemplated the case of the exoneration of land by redemption, but did not contemplate the case of exoneration by the attaching of an exemption, it was to be assumed that no such future exemption was intended to take place. Upon the second point, he contended that the circumstance referred to in *Attorney General v. Hill* (2), as forming the ground of exemption, and that on which the decision proceeded, was not the ownership of the Crown, but its occupation of the land in question.

[*SHEE, J.*, referred to the provision for redeeming the land tax on Crown lands, contained in 38 Geo. 3, c. 60, ss. 49, 50.]

Sir R. P. Collier, Q.C., in reply.

WILLES, J. We think the argument that the 38 Geo. 3, c. 60, established the existing land tax, as a perpetual charge on the land then subject thereto, ought to prevail, and that the judgment of the Court below must, therefore, be affirmed. At the time when that act passed, the 38 Geo. 3, c. 5, had already been enacted in the same year, forming one of a series of acts which from time to time imposed an annual land tax, and which made certain exemptions

(1) 2 M. & W. at p. 171.

(2) 2 M. & W. at p. 165.

from it; and we may assume, for the purpose of this argument, that if the property, the liability of which to land tax is in contest, had, at the passing of the 38 Geo. 3, c. 5, been in its present state, it would have been exempted from liability.

The exemption is contained in s. 25 of the act, and is to the following effect [the learned judge read the words of s. 25]. The act, then, exempted all sites of hospitals, and it exempted also such of the revenues of certain institutions as they had enjoyed before 1693. But that act had only a temporary operation; it granted the land tax for one year, and exempted the favoured institutions as they then were. In these circumstances the 38 Geo. 3, c. 60, was passed, making the land tax then existing perpetual, and if the legislature had thought proper to make it perpetual, with a proviso that the future use of land for a purpose coming within any one of the categories of the 25th section should bring it within that exemption, it was competent to them to do so. Now, there is no express condition to that effect; but it is said that, connecting the two acts together, we are to infer that this was the intention, and to conclude that, although the site was charged for a year under 38 Geo. 3, c. 5, and charged in perpetuum under 38 Geo. 3, c. 60, yet when its use was changed to a purpose within the scope of s. 25, its liability ceased. Is this argument sustained by the language of the act, and by the ordinary rules of construction? We think not. The language of c. 60 is general and unqualified, and the intention of the act appears to have been, that the land tax then payable should so continue to be paid in respect of the land then charged. When it says that the land tax shall be perpetual, it means that it shall be perpetually payable out of the land then subject thereto; and so far as relates to the language of the statute alone, it is not necessary to go beyond the first section to shew the true construction to be that put upon it by the elaborate and lucid judgment of my Brother Channell, the conclusion of which we adopt. The recital of the preamble is, that "it may materially conduce to strengthening and supporting the public credit, and to augmenting the national resources at this important conjuncture, that the duty now payable for one year on land should be made perpetual, but subject to redemption and purchase." This is the

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key to the act, and it seems to indicate the construction that we adopt. It then enacts (s. 1) that "the several and respective sums of money charged by virtue of an act of the present session of parliament, &c., on the respective counties, &c., in Great Britain, in respect of the manors, messuages, lands, tenements, and hereditaments in the said act mentioned, lying within the same counties, &c., respectively, to be raised, levied, and paid unto his Majesty within the space of one year from the 25th of March, 1798, shall from and after the expiration of the said term (except as hereinafter mentioned) continue, and be raised, levied, and paid yearly to his Majesty, his heirs and successors, from and after the 25th of March in every year for ever; and that all the several powers, rules, directions, provisions, articles, clauses, matters, and things contained in the said act, &c., as far as the same are not varied or otherwise provided for in and by this act, shall continue and be in full force, and be duly observed, &c., as if the same powers, &c. were particularly repeated and re-enacted in the body of this act and expressly applied to the provisions thereof, subject nevertheless to the rules, regulations, restrictions, and conditions of redemption or purchase herein mentioned." The 2nd section then excepts from the operation of the statute the sums charged by the previous act upon personal property, salaries, &c.

Now we have before us the case of property not exempted when, either the former or the latter act passed, and we have words in the latter act making the existing liability perpetual. Unless, therefore, some special reason exists to the contrary, we must give the words their natural effect, and hold that the payment directed by the act to be made must include every portion of the land tax then payable, and that the land tax here distrained for is the representative of a part of the land tax so made permanent. Now the purpose and provisions of the statute are all in favour of general taxation, and not in favour of the particular exceptions. Not only is the tax perpetually imposed in terms, but it is to be presently dealt with as if leviable for ever. Thus, it is made the subject of purchase or transfer. That purchase is to be effected by transferring to the government a sum of consols sufficient to produce a revenue somewhat exceeding the annual

value of the land tax redeemed ; with provisions for compensation out of the sum of consols originally paid, in the event of depreciation in the value of the tax. But there is no provision for the case of land, which, by changing its character and thus (as is contended) coming within the exception from the general taxation, might cease to produce anything. I will leave the argument on the statute with the remark, that its provisions rather tend to support the conclusion that no such extension of the exemption was intended as that now claimed. This branch of the subject is abundantly observed upon in the judgment of the Court below, and beyond indicating this conclusion it is unnecessary to follow out the argument farther.

But, the inference from other parts of the enactment thus supporting the natural meaning of the words of s. 1, various arguments were nevertheless urged on the part of the plaintiffs in error, to persuade us that this is not the true construction. It is said that on such a construction an absurdity will follow, for if c. 60 made perpetual the charge on lands then subject to it, so it also made perpetual the exemptions then existing. We were further told that there were certain provisions for the benefit of classes of persons which required this construction, and that a similar difficulty arose with respect to certain kinds of property not then existing. Thus, as to lands then used for the site of a hospital, the question was proposed, could it be said they should not be taxed when they ceased to be so used? As to the exempted persons, were only existing schoolmasters to be exempted, or was it not intended to include all schoolmasters? And as to mines and quarries which did not exist when the act was passed, were they to be free from the tax when they were afterwards opened? These, perhaps, were the most considerable of the arguments addressed to us on behalf of the plaintiffs; but they are without basis. First, as to the question of whether land used as a hospital at the time both acts were passed, but since (as in the case of St. Thomas's Hospital) diverted to another purpose, must in its new use be taxed, it does not now call for decision. When it arises, it will probably be said on the part of the public, insisting upon its liability, that the reason for the exemption ceasing the exemption itself ceases; that it applied only so long as the land

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continued to be used in the state in which it then was. On the other hand, it will be urged that the intention of the act was to treat hospitals and other exempted institutions as having redeemed the land tax, not only whilst they themselves used the land, but when they came to dispose of it. These would be the formulas which would have to be adopted as the expression of the two opposed views, but, whichever view the Court might adopt, it would not affect the present case, for it is obvious that no such considerations here arise. And I may add that no such question as that suggested, or as that we have to decide upon, could have arisen under the annual act containing the exemption, for it imposed the tax for the year on land *in statu quo*. Neither does that part of the exemption which relates to persons bear upon the question; because the act is here not dealing with individuals but with property, and provisions relating to classes of persons seem to have no application to a perpetually existing object of property, which may change its use. For, to the end of time, money will be made by teaching; the teachers may change, but the occupation, by which alone the class is ascertained, continues, and still produces money. But an end is put to this question by the statute taking away the tax in respect of personal property, salaries, &c. The last case was that of mines and quarries, as to which I will only say, that mines and quarries are nothing more than land and the potential profit of land in existence at the time the act was passed, and probably there will be no great difficulty in dealing with the case when it arises. The language, therefore, of c. 60 being general, and, indeed, universal in respect of the and tax then payable, and the general language of the first section not being modified in that or any other statute, we must say that the land tax is not taken away by reason of the change in the character of the land.

In conclusion, with respect to the claim of immunity on the ground that the hospital is Crown property, it could not at the time the act was passed have been considered as a thing required by usage and propriety that Crown property should not be taxed, merely because it was Crown property, and not on account of the occupation of the Crown, which is the true ground of exemption, seeing that sections 49, 50, contain express provisions for taxing

Crown land, and provide machinery for the redemption of the tax.
The judgment of the Court below must be affirmed.

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BYLES, BLACKBURN, KEATING, SHEE, and MONTAGUE SMITH, JJ.,
concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Sweeting & Lydall.*

Attorneys for defendant: *Batt & Son.*

[IN THE EXCHEQUER CHAMBER.]

May 18.

BARWICK v. ENGLISH JOINT STOCK BANK.

Principal and Agent—Representation—Money had and received.

A principal is liable to an action for the fraudulent misrepresentation of his agent, acting in the course of his business.

The plaintiff having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment for the oats supplied, should be paid, on receipt of the government money, in priority to any other payment, "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of 1227*l.*; the government money, amounting to 2676*l.*, was received by J. D., and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum of 2676*l.* in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation, and for money had and received:—

Held, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so.

Secondly, that the defendants would be liable for such fraud in their agent.

Thirdly, that the fraud was properly charged in the declaration as the fraud of the defendants.

Quære, whether the plaintiff could have recovered under the count for money had and received.

DECLARATION, 1st count, that, in consideration that the plaintiff would sell to or purchase for J. Davis & Son not exceeding 1000 quarters of oats for the use of their contract, the defendants pro-

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mised the plaintiff that they would honour the cheque of J. D. & Son in the plaintiff's favour in payment of the said goods, on receipt of the money from the commissariat in payment of the forage supplied for the then present month, in priority to any other payment except to the defendants' bank, provided that J. D. & Son were able to continue the contract, and were not made bankrupts; that the plaintiff, relying on the defendants' promise, and within a reasonable time, sold to and purchased for J. D. & Son, 1000 quarters of oats, to the amount 1227*l.*, under and according to the guarantee; that J. D. & Son made their cheque on the defendants in favour of the plaintiff in payment of the goods, and delivered it to the plaintiff; that the plaintiff did all things necessary to entitle him to have the cheque honoured; that the defendants received from the commissariat money in payment for the forage supplied by J. D. & Son for the said month, more than sufficient to pay the cheque, and out of which they could and ought to have honoured it; that all necessary conditions, &c., yet the defendant did not honour the cheque, nor have the said J. D. & Son nor the defendants paid the plaintiff the price of the said goods, or any part thereof, and the same remains due and unpaid to the plaintiff.

2nd count, for money had and received, and on accounts stated.

3rd count, that the defendants, by falsely and fraudulently representing to the plaintiff that J. D. & Son were not then indebted to them, induced the plaintiff to accept the guarantee in the first count mentioned, and to sell to and purchase for J. D. & Son 1000 quarters of oats on the faith of the said guarantee, and to take the cheque of J. D. & Son on the defendants in payment of the oats; averring that J. D. & Son were then, as the defendants well knew, indebted to the defendants in an amount greatly exceeding the cheque and any moneys then coming to the defendants on account of J. D. & Son, and out of which the cheque would otherwise have been payable: that by means of the premises the plaintiff was then deceived by defendants, and, believing their representations to be true, gave J. D. & Son credit for the said 1000 quarters of oats on the faith of the guarantee, and wholly lost the amount for which he so gave credit and the interest, and was otherwise injured.

Pleas—1, to the first count, denial of the promise; 2, to the

same, that the money received from the commissariat was not more than sufficient to pay what was due from J. D. & Son to the defendants' bank, wherefore, &c. ; 3, to the second count, never indebted ; 4, to the last count, not guilty.

Replication, joining issue on all the pleas, and to the second plea, on equitable grounds, that the money due to the defendants' bank was due before, and at the time of making the guarantee, whereof the defendants had notice, but the plaintiff had no notice, either at the time of accepting the guarantee, or of selling the oats, and that the defendants fraudulently concealed from the plaintiff the existence of the debt of J. D. & Son to the defendants, until after the selling of the oats, and represented to the plaintiff, and caused him to believe, that the only payments to be made to the defendants' bank out of the money to be received from the commissariat, would be payments of advances to be made by them after the guarantee, on account of the forage supply for the month ; and that the sale and purchase by the plaintiff to and for J. D. & Son, was the means of enabling the defendants to receive the money from the commissariat, and but for that they would not have received the money, or any part thereof, as they at the time of making the guarantee well knew.

Rejoinder, joining issue on the second replication.

The cause was tried before Martin, B., at Westminster, on the 15th of June, 1866 ; and on the evidence given for the plaintiff, the substance of which is fully stated in the judgment of the Court, the learned Baron ruled that there was no evidence to go to the jury in support of the plaintiff's case, and accordingly directed a nonsuit, but signed a bill of exceptions setting out the evidence.

Feb. 8. *Brown, Q.C. (Huddleston, Q.C., and Griffiths, with him)*, for the plaintiff, contended that his case rested on the ground on which in equity a second mortgagee has priority over a first mortgagee, whose negligence has enabled and induced him to advance money without knowledge of the first incumbrance. Story on Equity, s. 384, et seq. ; *Mocatta v. Murgatroyd* (1) ; *Berrisford v. Milward* (2) ; a doctrine applied to the case of a guarantee in *Lee*

(1) 1 P. Wms. 393.

(2) 2 Atk. 49.

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v. *Jones* (1), and open here to the plaintiff under his equitable replication; that as to the existence of an intention in the manager that the plaintiff should be induced by his representation to advance the money, which must be admitted to be an essential circumstance under the last count, there was ample evidence on which the jury might find it: *Swan v. North British Australasian Company*. (2)

He was stopped.

Mellish, Q.C. (*Watkin Williams* with him), for the defendants, contended that they clearly could not be liable on the guarantee declared upon in the first count, since they had satisfied its terms; that, further, there was no evidence of fraud, for that the transaction itself was abundant notice of the indebtedness of Davis; and it might be inferred from the guarantee itself, which was the termination and embodiment of the conversation, that there was knowledge or the means of knowledge in the plaintiff; that at least the want of knowledge in the plaintiff was owing to his negligence, since it was his business to inquire, and not the manager's voluntarily to disclose: *Hamilton v. Watson* (3); that even supposing there was a false representation by the agent, still the principal was not liable to an action: *Cornfoot v. Fowke* (4); *Udell v. Atherton* (5); *Wilde v. Gibson* (6); and that at least the fraud could not be stated as the fraud of the bank.

[WILLES, J. I should be sorry to have it supposed that *Cornfoot v. Fowke* (4) turned upon anything but a point of pleading. The learned judge referred to Com. Dig., Action on the Case for Deceit, B.]

Brown, Q.C., in reply, contended that in *Udell v. Atherton* (5) the general question of the liability of a principal for the acts of his agent, acting in the course of his agency, did not arise, but the decision turned on the facts of the case; and that *Hamilton v. Watson* (3) was no authority against the plaintiff when taken as

(1) 17 C. B. (N.S.) 482; 34 L. J. (C.P.) 131.

(2) 2 H. & C. 175; 32 L. J. (Ex.) 273: see per Cockburn, C.J. and Blackburn, J., 2 H. & C. at pp. 182, 188.

(3) 12 Cl. & F. 109.

(4) 6 M. & W. 358.

(5) 7 H. & N. 172; 30 L. J. (Ex.) 337: see the judgments of Martin and Bramwell, BB., 7 H. & N. at pp. 187, 193.

(6) 1 H. L. C. 605.

explained by Blackburn, J., in *Lee v. Jones* (1); the defendants were therefore liable on all the counts, and in particular as to the first, upon the ground that they were bound by way of estoppel by their agent's representation.

Cur. adv. vult.

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May 18. The judgment of the Court (Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.) was delivered by

WILLES, J. This case, in which the Court took time to consider their judgment, arose on a bill of exceptions to the ruling of my Brother Martin at the trial that there was no evidence to go to the jury.

It was an action brought for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which the plaintiff alleged to have been committed by the manager of the bank in the course of conducting their business. At the trial, two witnesses were called, first, Barwick, the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; and that he had done so upon a guarantee given to him by the bank, through their manager, the effect of which probably was, that the drafts of the plaintiff upon Davis were to be paid, subject to the debt of the bank. What were the precise terms of the guarantee did not appear, but it seems that the plaintiff became dissatisfied with it, and refused to supply more oats without getting a more satisfactory one; that he applied to the manager of the bank, and that after some conversation between them, a guarantee was given, which was in this form:—

“Dear Sir,—Referring to our conversation of this morning, I beg to repeat that if you sell to, or purchase for, J. Davis and Son not exceeding 1000 quarters of oats for the use of their contract, I will honour the cheque of Messrs. J. Davis and Son in your favour in payment of the same, on receipt of the money from the commissariat in payment of forage supplied for the present month, in priority to any other payment, except to this bank; and provided, as I explained to you, that they, J. Davis and Son, are able to continue their contract, and are not made bankrupts.

(Signed) “Don. M. Dewar, Manager.”

(1) 17 C. B. (N.S.) at pp. 503, 504; 34 L. J. (C.P.) 131.

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The plaintiff stated that in the course of conversation as to the guarantee, the manager told him that whatever time he received the government cheque, the plaintiff should receive the money.

Now, that being the state of things upon the evidence of the plaintiff, it is obvious that there was a case on which the jury might conclude, if they thought proper, that the guarantee given by the manager was represented by him to be a guarantee which would probably, or might probably, be paid, and that the plaintiff took the guarantee, supposing that it was of some value, and that the cheque would probably, or might probably, be paid. But if the manager at the time, from his knowledge of the accounts, knew that it was improbable in a very high degree that it would be paid, and knew and intended that it should not be paid, and kept back from the plaintiff the fact which made the payment of it improbable to the extent of being as a matter of business impossible, the jury might well have thought (and it was a matter within their province to decide upon) that he had been guilty of a fraud upon the plaintiff.

Now, was there evidence that such knowledge was in the mind of the manager? The plaintiff had no knowledge of the state of the accounts, and the manager made no communication to him with respect to it. But the evidence of Davis was given for the purpose of supplying that part of the case; and he stated that, immediately before the guarantee had been given, he went to the manager, and told him it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; to which the manager replied, that Davis must go and try his friends; on which Davis informed the manager that the plaintiff would go no further unless he had a further guarantee. Upon that the manager acted; and Davis added, "I owed the bank above 12,000*l*." The result was that oats were supplied by the plaintiff to Davis to the amount of 1227*l*., that Davis carried out his contract with the government, and that the commissariat paid him the sum of 2676*l*., which was paid by him into the bank. He thereupon handed a cheque to the plaintiff, who presented it to the bank, and without further explanation the cheque was refused.

This is the plain state of the facts; and it was contended on behalf of the bank that, inasmuch as the guarantee contains a

stipulation that the plaintiff's debt should be paid subsequent to the debt of the bank, which was to have priority, there was no fraud. We are unable to adopt that conclusion. I speak sparingly, because we desire not to anticipate the judgment which the constitutional tribunal, the jury, may pass. But they might, upon these facts, justly come to the conclusion, that the manager knew and intended that the guarantee should be unavailing; that he procured for his employers, the bank, the government cheque, by keeping back from the plaintiff the state of Davis's account, and that he intended to do so. If the jury took that view of the facts, they would conclude that there was such a fraud in the manager as the plaintiff complained of.

If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my Brothers Martin and Bramwell in *Udell v. Atherton* (1), the case most relied upon for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time (2)—but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. (3) That principle is acted upon every day in

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(1) 7 H. & N. 172; 30 L. J. (Ex.) 337. (2) *Hern v. Nichols*, 1 Salk. 289.

(3) See *Laugher v. Pointer*, 5 B. & C. 547, at p. 554.

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running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. (1) It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye laws. (2) It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. (3) In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

The only other point which was made, and it had at first a somewhat plausible aspect, was this:—It is said, if it be established that the bank are answerable for this fraud, it is the fraud of the manager, and ought not to have been described, as here, as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in case for fraud, or whether, under the circumstances, money having been actually procured for and paid into the bank, which ought to have got into the plaintiff's hands, the count for money had and received is not applicable to the case. I do not discuss that question, because in common law pleading no such difficulty as is here suggested is recognized. If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of *Raphael v. Goodman*. (4) The sheriff sued upon a bond; plea, that the bond was obtained

(1) *Erwbank v. Nutting*, 7 C. B. 797.

(2) *Goff v. Great Northern Railway Company*, 3 E. & E. 672; 30 L. J. (Q.B.) 148, explaining (at 3 E. & E. p. 683) *Roe v. Birkenhead Railway Com-*

pany, 7 Ex. 36; and see *Barry v. Midland Railway Company*, Ir. L. Rep. 1 C. L. 130.

(3) *Huzzey v. Field*, 2 C. M. & R. 432, at p. 440.

(4) 8 A. & E. 565.

by the sheriff and others by fraud; proof, that it was obtained by the fraud of the officer; held, the plea was sufficiently proved.

Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, especially considering that the whole case may not have been before them, we think this is a matter proper for their determination, and there ought therefore to be a *venire de novo*.

Venire de novo.

Attorney for plaintiff: *J. H. Howard*.

Attorneys for defendants: *Lawrance, Plews, & Boyer*.

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JESSEL v. BATH AND OTHERS.

April 29.

Bill of Lading—Written and Printed Words—Construction—Bills of Lading Act (18 & 19 Vict. c. 111), s. 3—Ship's Agent or Consignee.

The defendants were charterers of a steamship engaged in the Mediterranean trade, and had ship's agents or consignees at the ports of call. It is the custom for a ship's agent or consignee to sign bills of lading instead of the master, and no difference is recognised in trade usage between the efficacy of his signature and that of the master. The defendants' agents at Genoa signed a bill of lading for manganese, shipped in bulk and not weighed at the time of shipment, which described the manganese as of a certain weight, but contained in print the words, "weight, contents, and value unknown." The plaintiff was assignee for full value of this bill, and the whole of the manganese shipped was, on the arrival of the ship, delivered to him, but was found to be short of the weight stated in the bill. In an action brought by him to recover damages for non-delivery of the full weight:—

Held, first, that the printed words controlled the statement of weight.

Secondly, that the defendants were not bound by the signature of their agents to a bill of lading for a greater quantity than was actually shipped.

CASE stated without pleadings, and setting out the following facts:—

The plaintiff was assignee for full value, and *bonâ fide* holder, before the arrival of the ship, of a bill of lading for goods shipped on board the defendants' vessel; and he brought this action to recover damages for the non-delivery of 7 tons 12 cwt. of manganese, the residue of 33 tons 19 cwt. 1½ lb., stated in the bill of lading to have been shipped on board the defendants' ship *Meteor*.

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The defendants were charterers of the ship *Meteor*, which traded to Genoa and other Mediterranean ports. Their agents at Genoa were Messrs. Barchi Brothers. On the 12th of September, 1865, manganese in bulk was shipped on board the *Meteor* by Messrs. Viacava and Riga, to be carried to Swansea; and the defendants' agents signed a bill of lading to the following effect:—

“Shipped in good order and condition by *Messrs. Viacava & Riga* in and upon the steamship called the *Meteor*, &c., *thirty-four thousand four hundred and sixty kilogrammes mineral in bulk*, being marked and numbered as per margin, and to be delivered, &c., at the aforesaid port of *Swansea*, &c., unto *Mr. Richard Harris Vivian*, or to his or their assigns, freight and primage for the said goods, as per margin, to be paid by the *consignee*, &c.”

“Dated in *Genoa*, 12 September, 1865.

“Weight, contents, and value unknown, and not answerable for leakage, breakage, or rust. The goods to be discharged, &c. The owners of this ship will not be accountable for gold, silver, bullion, specie, jewellery or precious stones, unless bills of lading are signed for such good and the value declared in the bills of lading.

“(Signed) *G. & E. Barchi Brothers, consignees.*”

The heading of the bill of lading was as follows:—

“Bristol Channel and Mediterranean,

“Henry Bath & Son,

“Swansea.

“Agents,

“Bristol, Messrs. Turner, Edwards, & Co.

“Genoa, Signor G. & E. Barchi Brothers.

(The names of agents at Leghorn, Naples and Palermo followed, and in the margin of the bill were the words):

<i>Mineral in bulk, kilos.</i>	.	.	.	.	34.460
<i>at 10.15 kilos. the ton.</i>	.	.	.	.	33 19 0 1½
<hr/>					
<i>Freight on 33t. 19cwt. 0qr. 1½lb. at 18s.</i>					
per ton	.	.	.	.	£30 11 1
15 per cent. primage	.	.	.	.	4 11 8
<hr/>					
Total	.	.	.	.	£35 2 9
<hr/>					

This bill of lading was in print, excepting the words above printed in italics, which were written, and the written words were in the handwriting of Viacava & Riga (the shippers) or their agents, except the signature by Barchi Brothers. The title "consignees," under which Barchi Brothers signed, is commonly used by foreigners in signing bills of lading as equivalent to "agents."

The whole quantity of manganese on board the ship when she arrived at Swansea was 26 tons 6 cwt., which was duly delivered to the plaintiff as assignee of the bill of lading; and it was admitted that the manganese so delivered was the whole that was shipped on board the *Meteor* at Genoa.

The manganese, which was shipped in bulk, was not weighed by the master of the *Meteor*, and neither the shippers, nor the plaintiff, nor the defendants, nor Messrs. Barchi their agents, nor the master of the *Meteor*, had notice that the weight was short until after the vessel arrived at Swansea.

Upon the position of ship's agents or consignees, the case stated that it is their duty to obtain cargo and generally to do what is necessary on behalf of the charterer; that since the introduction of steam navigation, steam vessels remain a much shorter time in port than was formerly the case with sailing vessels, whether the port be the terminus from which the voyage begins or merely a port of call; and it frequently happens that it would be impossible for the master during the time of his stay in port to sign the bills of lading applicable to the different shipments; and that a practice has in consequence grown up for the agent to sign bills of lading instead of the master; that no difference is recognised as any matter of trade usage or understanding between the efficacy of a signature by the agent and of a signature by the master; that the agent does not weigh the goods shipped, but takes the weight from the shipper. (1)

(1) In the case as originally drawn, it was stated that the bill of lading "was signed by their [the defendants'] agents, Messrs. Barchi, at Genoa, on their behalf." On the argument of the case in Michaelmas Term, it was contended by the plaintiff that these words expressed a general and absolute agency in Messrs. Barchi to sign bills of lading

for the defendants; by the defendants that no such authority was implied by it, and that it expressed no greater authority than that of a master, who signs on behalf of himself and of the owners. The case was sent to an arbitrator on this point, and evidence was given before him, the effect of which was stated in the case as above mentioned.

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The question for the opinion of the Court was, whether, upon the facts stated, the defendants were liable to the plaintiff for the non-delivery of the residue?

Cole, Q.C. (Bere with him), for the plaintiff. First, the defendants will rely upon the words, "weight, contents, and value unknown;" but it is impossible to allow these words, which are merely in print, to contradict a distinct statement of weight inserted in writing, and carried out in the calculation of freight: *Gumm v. Tyrie* (1); *Robertson v. French*. (2) Similar words did not avail to protect the defendant in *Bradley v. Dunipace*. (3) Secondly, assuming the defendants not to be protected by these words, they are liable for the act of their agents abroad. A ship's agent is not in the same position as a master, and the cases which decide that a ship's owner or charterer is not liable on a bill of lading signed by the master for goods not put on board, are not applicable. The agent's functions are more extended, and he signs with the authority and in lieu of the owner or charterer himself. The defendants, therefore, who sign by their agent, are the persons signing within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111) s. 3.

Sir G. Honyman (Anstie with him), for the defendants. First, the defendants are protected by the words, "weight, contents, and value unknown." In *Bradley v. Dunipace* (3) the plaintiff recovered against the master, because it was considered that the weight mentioned in the bill specified the goods, and that there was a delivery of the wrong goods, and not merely of short weight. *Gumm v. Tyrie* (1) decided only that special provisions in writing override general printed statements which are inconsistent with them; but there is here no inconsistency, and *Hadow v. Parry* (4) is a direct authority in favour of the defendants. Secondly, even if this is not so, yet the defendants are not liable. This would be clear if the master had signed; for *Grant v. Norway* (5), following the dictum of Littledale, J., in *Berkley v. Watling* (6), shews that, at common law, the owner or charterer is not liable on a bill

(1) 6 B. & S. 298; 33 L. J. (Q.B.) 97.

(2) 4 East, 130.

(3) 1 H. & C. 521; 32 L. J. (Ex.) 22.

(4) 3 Taun. 303.

(5) 10 C. B. 665.

(6) 7 A. & E. 29, at p. 38.

signed by the master for goods never put on board ; and *Hubbersty v. Ward* (1) settles the same with regard to a bill of lading for a greater weight than was shipped. The same principle was applied in *Coleman v. Riches* (2) to exonerate a wharfinger from liability for a statement made by his agent. The Bills of Lading Act has no application ; for it only makes the bill of lading conclusive against the master or other person signing the same. But if the defendants are liable upon the signature of Messrs. Barchi as though they were “persons signing the same,” it must be because Messrs. Barchi had a general and unlimited power to sign on their behalf. If so, there is no occasion to resort to the statute, and the defendants would be liable at common law. But it lies upon the plaintiff to prove such an agency, and the facts stated in the case do not support, but, on the contrary, negative the assumption, and shew that the function and powers of the agent or consignee are no greater or more extensive than those of a master, and that he signs, not in place of the owner or charterer, but of the master himself. The case of *Meyer v. Dresser* (3), by implication, negatives the plaintiff’s contention, for it decides that the statute applies to the case of the master himself suing on the bill of lading, and that he could not claim to occupy the position of the owners on whose behalf he sued, but it would have been unnecessary to lay down the latter proposition if the statute had in fact applied to the owners.

KELLY, C.B. I think the defendants are entitled to judgment. It is clear upon the authorities cited that, but for the recent statute (18 & 19 Vict. c. 111), the defendants would not be liable ; for a due delivery has been made of the whole of the manganese which was shipped at Genoa. But it is said that, under the act, the plaintiff, who is the bonâ fide holder for value of the bill of lading, is entitled to recover for the whole amount stated in it, independently of the quantity actually shipped. Looking at the bill of lading alone, it might be questionable whether, independently of the question on the statute, the defendants could be

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(1) 8 Ex. 330 ; 22 L. J. (Ex.) 113. (3) 16 C. B. (N.S.) 646 ; 33 L. J.
(2) 16 C. B. 104 ; 24 L. J. (C.P.) 125. (C.P.) 289.

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liable. For the written part of the bill is not entirely inconsistent with the printed. The whole may be reasonably and fairly read as meaning, that a quantity of manganese had been received on board, appearing to amount to thirty-three tons, but that the person signing the bill would not be liable for any deficiency, inasmuch as he had not in fact ascertained, and therefore did not know, the true weight.

But I do not rest my judgment on this ground. We are called upon for the first time to put a construction on this statute, and it is fit that we should state our opinion as to its effect with reference to the character of the party signing the bill of lading, where an action is brought against the owner or charterer. The preamble of the act recites that, "it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other persons signing the same, on the ground of the goods not having been laden as aforesaid;" and in conformity with this language the enacting words of s. 3 are, that "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped."

Now here the master certainly has not signed, but other persons, the Messrs. Barchi, have; are then the defendants within this second branch of the alternative? They cannot be so, unless Messrs. Barchi's signature is equivalent to their own,—that is, unless Messrs. Barchi have signed in their place.

Now the case states as follows. [His Lordship read the part of the case stating the position and duties of a consignee or agent.] In the first place, then, it appears that these gentlemen, the defendants' agents, have signed in conformity with a practice arising out of circumstances which would make it not merely inconvenient, but impossible, for the agents to weigh the goods, and that the weight is accordingly taken from the shipper. In the second place, it appears that, under such circumstances, the agent signs

"instead of the master," and that "no difference is recognised, as any matter of trade usage or understanding, between the efficacy of a signature by the agent and of a signature by the master." This amounts then to a statement that Messrs. Barchi signed instead of the master, and not instead of the defendants; and if this action had been against the master, the point raised by the plaintiff might have been material; but being neither against the master, nor against the person actually signing the bill of lading, it entirely fails. The defendants are, therefore, entitled to judgment.

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MARTIN, B. I am of the same opinion, and my impression is that no one would be liable on this bill of lading in such an action as the present. The heading of the bill of lading is as follows. [The learned judge read the heading.] Now although only these four Mediterranean ports are mentioned, it is very well known that a regular trade is carried on by vessels trading to the Mediterranean, both to these and other ports, and that this course is usually followed: They go to Gibraltar, and spend a day there; then to the three Spanish ports of Barcelona, Alicante, and Malaga, stopping a day at each; then across to Genoa, where they stop a night, and then to Leghorn; from Leghorn to Civita Vecchia and Naples, and back again to Leghorn. That is a common well-known trade, and it is obvious that goods must be shipped on board hastily, and that goods shipped in bulk at a considerable distance from the shore, as is the case at Genoa, for instance, cannot by possibility be weighed. The person, therefore, signing the bill of lading, by signing for the amount with this qualification, "weight, contents, and value unknown," merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter. The insertion of the weight in the margin, and the calculation of freight upon it, does not carry the matter any further; he calculates the freight, as it is his duty to do, upon the weight as stated to him. The qualification is perfectly reasonable; and I do not understand how a statement so qualified binds any one. My impression therefore is, that, even as against the consignees, this action would not succeed; clearly, however, it will not as against the defendants.

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BRAMWELL, B. I am of the same opinion, and for the same reasons. This document, though apparently contradictory, means this:—a certain quantity of manganese has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present.

But another point has been raised, on which I think the Court ought to give judgment. At common law the defendants would not be liable on this bill, because, although Messrs. Barchi were their agents to conduct their business, they were not their agents to make an admission contrary to the fact, by signing a bill of lading for a quantity they knew nothing of. Then does the statute make any difference? I think not; it seems to me only to mean that the person actually signing the bill of lading shall be liable. If, for instance, an owner had signed, it would be conclusive against him, but it would not be so against the other owners. If then the bill of lading is only conclusive against the person actually signing, the defendants, not being the signers of the bill in question, are not made liable by the statute. They are, therefore, entitled to our judgment.

Judgment for the defendants.

Attorneys for plaintiff: *F. White & Sons, for H. Brittan & Son, Bristol.*

Attorneys for defendants: *Vizard & Co., for Brown & Davis, Swansea.*

[IN THE EXCHEQUER CHAMBER.]

TETLEY AND OTHERS v. WANLESS.

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May 20.

Debtor and Creditor—Deed under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Inequality—Scheduled Creditors—Release after Action—Pleading—Plea to further Maintenance.

A deed under s. 192 of the Bankruptcy Act, 1861, between the debtor of the first part, J. D., a surety, of the second part, and the several persons, creditors of the debtor, whose names were thereunto subscribed, and all other the creditors of the debtor, of the third part, after reciting that the defendant was indebted "to the said several creditors in the several sums of money set opposite to their respective names in the schedule" thereunder written, and that it had been agreed by the requisite majority in number and value of the said several creditors to accept the composition and security therein expressed in full satisfaction of their respective debts, witnessed that in consideration of the joint and several promissory notes of the debtor and J. D. for the payment of such composition "on the respective sums of money aforesaid," they, the said creditors, parties thereto of the third part, released to the defendant all actions, suits, debts, claims, and demands, which they had against him, and accepted the stipulated composition in full satisfaction of the debts and sums due to them "specified in the schedule;" and the debtor and J. D. covenanted with each and every of the creditors parties thereto of the third part to pay the composition "upon their respective debts as aforesaid," and to make and deliver to them "the said promissory notes":—

Held, that there was no inequality in the deed, as on the true construction of it all the creditors, whether their debts were scheduled or not, were equally entitled to the benefit of the covenants therein contained.

To a declaration in debt by non-assenting creditors, the defendant (the debtor) pleaded the above deed, which had been entered into after the commencement of the suit, *generally* to the further maintenance of the action:—

Held, that the release contained in the deed discharged not only the debt sued for, but also all claims or demands arising therefrom by way of damages for its detention, costs, or otherwise, and that the plea was therefore rightly pleaded generally.

ERROR and appeal against a judgment of the Court of Exchequer discharging a rule to enter a verdict for the plaintiffs, or judgment non obstante veredicto. (1)

The declaration was on the common indebitatus counts. Plea to the further maintenance of the action, that after the accruing of the plaintiffs' claim, and after the 11th of October, 1861, and after the commencement of this suit, a deed bearing date the 7th of May, 1866, was entered into between the defendant of the

(1) Reported ante, p. 21, where the facts and pleadings are fully stated.

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first part, John Dobbing of the second part, and the several persons respectively creditors of the defendant, or the authorized agents of such creditors (not only those whose names and seals were thereunto subscribed and set, but also all other the creditors of the defendant), of the third part; and by the said deed, after reciting that the defendant was indebted to the said several creditors in the sums of money set opposite to their several and respective names in the schedule thereunder written, and that it was agreed by the requisite majority in number and value of the said several creditors to accept the composition and security therein expressed in full satisfaction of such respective debts, it was witnessed that in consideration of the joint and several promissory notes of the defendant and the said John Dobbing for the payment of such composition upon the respective sums of money aforesaid, they, the said creditors, parties thereto of the third part, for themselves and their heirs, &c., did, to the intent that those presents should be effectual and binding on all the creditors of the defendant, pursuant to the provisions of the Bankruptcy Act, 1861, thereby release unto the defendant, his heirs, &c., all actions, suits, debts, claims or demands, which the creditors of the defendant had or had had against the defendant, and did accept the stipulated composition in full satisfaction of the several debts and sums of money owing to them by the defendant, specified in the said schedule; and the defendant and the said John Dobbing thereby covenanted with each and every of the creditors, parties thereto of the third part, to pay the composition upon their respective debts as aforesaid, and to make and deliver to them the said promissory notes. Averments of performance of all conditions necessary to make the deed as binding on all the creditors of the defendant as if they had executed the same; that the plaintiffs were creditors of the defendant within the meaning of the deed, and of the Bankruptcy Act, 1861; that the claim sued for was a claim within the said deed, and by reason of the premises the defendant became and was entitled to plead the said deed in bar to the further maintenance of this action. Issue.

The action was commenced before the execution of the composition deed set forth in the plea, which, however, had in the first instance been pleaded in bar. No tender of the composition to

the plaintiffs was specifically alleged in the plea, and at the trial none was proved to have been made. Under these circumstances a verdict was entered for the defendant with leave to move to enter it for the plaintiffs, on the ground that the plea was a plea in bar, and was not proved; and secondly, that tender of the composition was put in issue by the replication, and was not proved. A rule was afterwards obtained in pursuance of the leave reserved, and also calling on the defendant to shew cause why judgment should not be entered for the plaintiffs non obstante veredicto, on the grounds, first, that the deed mentioned in the plea did not release the plaintiffs' debt, not being a scheduled debt; secondly, that the provisions of the deed were unequal, the giving of the notes being confined to scheduled debts; and thirdly, that the plea was bad for not averring a tender of the composition.

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The Court of Exchequer, upon the argument of the rule, directed the plea to be amended by adding the words necessary to make it a plea to the further maintenance, and discharged the rule.

Kemplay, for the plaintiffs. First, the deed is unequal. It professes to be with all the creditors, but the recital contracts its operation to the scheduled creditors. They alone have the benefit of the covenant by the surety to pay the composition and deliver the promissory notes. The plaintiffs could not sue him if he should refuse to give them the composition or notes: *Buvelot v. Mills* (1); *Hickmott v. Simmonds*. (2)

[BLACKBURN, J. The first recital proves that the parties meant to have a complete schedule to the deed, including the name of every creditor. But does it control the construction of the deed?]

The language of the deed throughout is restrictive, and the release, though otherwise general in its terms, is limited to the debts "specified in the schedule."

[BLACKBURN, J. It will be difficult to maintain that this release is not general. It is given by the parties to the deed of the third part; that is, by all the creditors.]

[No further argument was offered on this point, nor was it con-

(1) Law Rep. 1 Q. B. 104.

(2) Law Rep. 2 Eq. 462.

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tended that the release was conditional on a tender of the composition. This being so, the questions whether it was necessary specifically to allege tender in the plea, and whether, supposing it to have been sufficiently alleged, it was put in issue by the replication, did not arise.]

Secondly, the plea in its amended form was not proved. It should have been limited to the debt sued for: *Henry v. Earl* (1); *Goodwin v. Cremer*. (2)

[WILLES, J. Those were cases of a plea of payment. This is one of a release in general terms, applicable both to the debt and damages for the detention of the debt.]

The release cannot be an answer to the costs to which the plaintiffs were entitled up to the time of plea pleaded.

[WILLES, J. If the release applies to the debt and its accessories, how can the plaintiffs be entitled to any costs? It is necessary for you to argue that it does not apply to the damages for detaining the debt.]

The plaintiffs ought to be at liberty to sign judgment for nominal damages, which would carry costs. It is unjust that they should be deprived of them, and they have no other means of obtaining them. They cannot, under Rule 22, Trin. Term, 1853, confess the plea, and thus entitle themselves to the costs, because that rule does not apply to a case where a plea to the further maintenance is pleaded alone. *Kemp and Another v. Balls* (3); *Cook v. Hopewell* (4); and Rule 23, Trin. Term, 1853, does not apply, because it is limited to pleas *pais darrein continuance*, i.e. of matter arising since the last pleading.

Manisty, Q.C. (*Lewers* with him), for the defendant, was not called upon.

The judgment of the Court (Willes, Byles, Blackburn, Keating, Shee, and Montague Smith, JJ.) was delivered by,

WILLES, J. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. Two points have been urged on us on behalf of the plaintiffs. The first is, that the deed pleaded is not within the Bankruptcy Act, 1861, s. 192, because it

(1) 8 M. & W. 228.

(3) 10 Ex. 607.

(2) 18 Q. B. 757.

(4) 11 Ex. 555.

is unequal. Now it purports to be between a debtor of the first part, a surety of the second part, and the several persons, creditors of the debtor, whose names were thereunto subscribed, and all other the creditors of the debtor of the third part. It then proceeds to recite—and to recite erroneously—that the debtor was indebted to the “said several creditors in the several sums of money set opposite their several and respective names,” the schedule, in point of fact, not containing the names of all the creditors. Then follows a release in general terms by the parties to the deed of the third part of all actions, suits, debts, claims, and demands which they had or had had against the debtor. The deed also contains a covenant by the debtor and the surety to pay the stipulated composition to all the creditors “upon their respective debts as aforesaid.” It is said that we ought to read this expression, and certain other similar expressions in the deed, as restrictive of the general description of creditors, given in the clause naming the parties to the deed, to creditors whose debts are specified in the schedule. If this contention prevailed, we should be placing a very narrow construction on the instrument. And further, we should be forgetting that a mere mistake—such as we can see this erroneous recital to be—ought rather to be rejected altogether than read as a restriction. If indeed the words *could* be read as a restriction in harmony with the rest of the deed, then they would doubtless have to be so read. But in this case they cannot be read as restrictive without destroying the effect of the deed. We are, therefore, of opinion that the interpretation placed upon the deed by the Court of Exchequer was the correct one.

With regard to the second point, we must take the plea in its amended form. We cannot, as was laid down in *Mellish v. Richardson* (1), inquire into the propriety of amendments made in the court below. Then it is argued that the plea in its amended form is not proved. The effect, we are told, of a release after action brought of a debt which is the cause of action is only to discharge the debt itself, subject to the creditor’s right to go on with his action to obtain a judgment for nominal damages, to which judgment the law will annex costs. Now, the release here is “of all actions, suits, debts, claims, or demands;” and I may say it is

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commendable in not adopting the voluminous phraseology common in releases. What, then, is the effect of releasing "all actions, suits, debts, claims, or demands?" If judgment had actually been obtained before the release was given, a technical point might possibly have been raised, that the terms of the release did not include executions. In Co. Litt. s. 507, we read, that "where a man recovereth debt or damages, and it is agreed betweene them that the plaintifé shall not sue execution, then it behoveth that the plaintife make a release to him of all manner of executions." Whence it would seem to follow that a release of a debt or damages recovered ought in express language to include executions. But the next section (s. 508), states that a release of "all manner of demands is the best release to him to whom it is made that he can have, and shall enure most to his advantage." The form of release, therefore, adopted here being of all demands, is the most beneficial and the proper mode of releasing all descriptions of claim, even including executions.

This release, then, having been given, the action was gone, and of course the debt was gone also; but it is said something fresh to which the plaintiffs are entitled has sprung up. It seems to us that view of the case is reconcileable neither with common sense nor with the authorities. The point, indeed, was not expressly dealt with in the cases cited, though Lord Abinger's remarks in *Henry v. Earl* (1), which, as to the necessity of answering costs, do not appear satisfactory nor reconcileable with *Corbett v. Swinburne* (2), have a bearing upon it. Still that case, of *Henry v. Earl*, and all the other cases referred to, are not of release, but of *payment*, when the question has arisen, what the payment covered. It might turn out to be confined to the debt, and the damages for the detention for the debt would then remain to be sued for. Even in the case of payment, however, we agree with the opinion expressed by Maule, J., in *Beaumont v. Greathead* (3), that a payment in satisfaction and discharge of a debt is a payment in satisfaction and discharge of the nominal damages due for its detention. But no doubt an argument might arise as to whether the payment pleaded was made on account only, or in discharge of the debt and damages. That might be, as appears from *Goodwin v.*

(1) 8 M. & W. at p. 233. (2) 8 A. & E. 673. (3) 2 C. B. at p. 499.

Cremer (1), a question for the jury. It might appear that the payment was in satisfaction of everything, or of the debt only, and not of its accessories. Here, however, there is a release of actions, suits, debts, and demands, and such a release of a debt unquestionably releases all actions thereupon.

I wish to add a reference to the case of *Van Sandau v. Corsbie* (2), where a similar question to the present was discussed. A certificate in bankruptcy was in that case held to bar not only the original debt due from the bankrupt to his creditor, but also any right to damages accessory to and consequential upon that original debt; and the certificate was likened to a release of the debt and all demands arising therefrom. (3) Upon principle and authority, therefore, we think that this release stopped the action entirely, and was pleadable as a defence to the plaintiffs' whole claim. The plaintiffs could not go on with the action. If they had, and had obtained judgment for nominal damages, the release would have barred them, together with the costs. The judgment of the Court of Exchequer must accordingly be affirmed.

*Judgment affirmed ; and judgment for the
defendant in error.*

Attorney for plaintiffs: *R. Walthew, agent for Wood & Killick, Bradford.*

Attorneys for defendant: *T. M. & M. Howe, agent for Eglinton, Sunderland.*

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(1) 18 Q. B. 757.

(2) 3 B. & A. 13.

(3) Per Parke arguendo, at p. 17,
and per Best, J., at p. 20.

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May 20.

[IN THE EXCHEQUER CHAMBER.]

WOOD AND ANOTHER *v.* PRIESTNER.*Guarantee, Continuing—Future Debt—Construction.*

The defendant's son being indebted to the plaintiffs for coals supplied on credit, and the plaintiffs refusing to continue to supply coals unless guaranteed, the defendant gave this guarantee: "In consideration of the credit given by the H. G. C. Co. to my son for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing to an amount not exceeding the sum of 100*l.*:"—

Held (affirming the judgment of the Court below), a continuing guarantee.

APPEAL from the judgment of the Court of Exchequer, discharging a rule to enter a nonsuit. [Reported, ante, p. 66.]

H. Cowie, for the defendant. It appears from the circumstances of this case that when the guarantee was given, there was an account existing between the plaintiffs and the defendant's son, shewing a balance due from him to them, of 100*l.*, the exact sum guaranteed. This fact fortifies the natural construction of the instrument, which is, that it related to the then existing account. The expressions, "any accounts due," and "whatever may be owing," may be relied on as indicative of the defendant's intention to give a continuing guarantee. But they are capable of being explained by the circumstance that the defendant was ignorant of the mode in which the balance due from his son to the plaintiffs was made up. On the other hand, the words "credit given," "coals supplied," cannot be read, without violence, as applicable to future transactions. In *Allnutt v. Ashenden* (1) a guarantee very similar in form to this case was held not to extend to future supplies of goods. The ground of that decision was, that the words there, like the words here, in their *primary* meaning, referred to the past, and therefore could not be applied to the future by a reference to extrinsic circumstances: see per Bramwell, B., in *Broom v. Batchelor*. (2)

E. James, Q.C. (*Baylis* with him) for the plaintiffs, was not called on.

(1) 5 M. & G. 392.

(2) 1 H. & N. 255; 25 L. J. (Ex.) 299.

The judgment of the Court (Willes, Byles, Blackburn, Keating, Shee, and Montague Smith, JJ.), was delivered by

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WILLES, J. This case has been very clearly and ingeniously argued, but the argument addressed to us has not succeeded in raising any doubt in the mind of the Court. We are all of opinion that the decision of the Court of Exchequer was right. This guarantee was given in favour of the defendant's son, a person who had previously had a monthly credit given to him by the plaintiffs. He was desirous of having that credit given again, and accordingly obtained this guarantee. It commences with the words, "in consideration of the credit given by Messrs. the Hindley Green Coal Company to my son," and these words appear applicable to the same credit already given, *continued*. At the outset, then, the guarantee refers to a credit given and continued. Then, after stating that the defendant would hold himself responsible as a guarantee for a 100*l.*, it proceeds thus: "in default of non-payment of any accounts due," an expression which might, it is true, be limited to any accounts then due, but which seems rather to refer to anything which might appear from time to time to be due on the current accounts between the parties. The guarantee then binds the defendant to pay "whatever may be owing," words which, again, might possibly be applied to whatever might be owing upon accounts between the parties being struck. They seem to us, however, to apply rather to a future state of things. Under these circumstances, the natural construction appears to be that the surety should be answerable for whatever might become due on the account to the amount of 100*l.* Notwithstanding, therefore, the argument for the defendant, to which we have listened with the attention which it deserved, the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Gregory & Co., agents for W. L. Welsh, Manchester.*

Attorneys for plaintiff: *Edwards, Layton, & Jaques, for J. Eltoft, Manchester.*

END OF EASTER TERM.

CASES
DETERMINED BY THE
COURT OF EXCHEQUER
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,
IN AND AFTER
TRINITY TERM, XXX VICTORIA.

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May 27.

WILLIAMS v. THE SIDMOUTH RAILWAY AND HARBOUR
COMPANY.

Re WEBBER.

Sci. Fa.—Discretion of Court—Sci. Fa. on a Record erroneous on the face of it.

The Court will not refuse to issue a writ of sci. fa., to obtain execution on a judgment, on the ground that the judgment roll is erroneous on the face of it.

THE plaintiff in this case had obtained judgment against the defendants, a railway company, and subsequently a rule nisi calling on John Benjamin Webber, a shareholder in the company, to shew cause why a writ of sci. fa. should not issue against him as one of the shareholders in the company.

It appeared from the judgment roll that the plaintiff had sued in his own name as assignee of a Lloyd's bond given by the defendants to one Burgess and by him assigned to the plaintiff.

Barnard shewed cause. There is obvious error in this record.

It appears from it that the plaintiff was the assignee of a chose in action not assignable at law. Under these circumstances the Court will not direct the writ of sci. fa. to issue.

H. Matthews, and *J. B. Jacques*, in support of the rule, were not called upon.

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KELLY, C.B. This rule must be made absolute. We must assume, in the absence of evidence to the contrary, that this judgment has been honestly obtained by a bonâ fide creditor of the company. That being so, he is entitled, if he cannot obtain satisfaction of his judgment otherwise, to issue execution against a shareholder individually; and his only means of doing so is by a writ of sci. fa. We really have not, under such circumstances, any discretion.

BRAMWELL, and MARTIN, BB., concurred.

Rule absolute.

Attorney for plaintiff: *K. H. Gough*.

Attorney for shareholder: *J. B. Sorrell*.

CHADWICK AND ANOTHER v. MARSDEN.

June 4.

Lease—Construction—Preservation of passage for “water and soil.”

In a lease of certain premises with their appurtenances the lessor reserved out of the demise “the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised in and through the sewers and watercourses made or to be made within, through, or under the said premises:”—

Held, first, that the reservation extended to water and soil coming from contiguous lands and buildings, whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; and secondly, that it did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and that therefore it did not give to the occupier of certain tan-pits, who claimed under the lessor, a right of passage for the refuse of those pits.

DECLARATION. That the plaintiffs were the owners and occupiers of certain paper mills at Broughton, near Manchester, and the defendant was possessed of a tan-yard adjoining to the said paper mills of the plaintiffs, which said tan-yard was under the care of the defendant, who therein carried on his trade and business of a tanner; yet the defendant, not regarding his duty in

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that behalf, took such bad care of his said tan-yard, and of his tan-pits, and of the noxious and offensive matters therein respectively, that, by reason of the defendant's want of care thereof, divers large quantities of the refuse and other noxious and offensive matters in the said tan-pits and tan-yard respectively oozed and escaped therefrom, and percolated and ran into the said paper mills of the plaintiffs, whereby the said paper mills of the plaintiffs were greatly damaged, and became less fit than they otherwise would have been for the manufacture of paper therein respectively.

Pleas. 1. Not guilty. 2. That the grievances complained of were caused and occasioned solely by the acts, defaults, negligence, and improper conduct of the plaintiffs; to wit, by their wrongfully stopping up and destroying a certain drain, through which the defendant had theretofore been and still was entitled and accustomed to discharge the said refuse and other noxious and offensive matter into a certain stream near to the said premises of the plaintiffs. Issue.

The cause was tried before Montague Smith, J., at the Manchester winter assizes, 1866, when the following facts were proved:—

Lord Derby is the owner of certain land at Broughton, near Manchester, a portion of which in October, 1863, he leased for building purposes for 999 years to Mr. Hall Ashworth. The lease contained this reservation: "Except and reserved out of this demise the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised, in and through the sewers and watercourses made or to be made within, through, or under the said premises." There was also a stipulation that the occupier should not carry on the trade of a tanner without the licence and consent in writing of the landlord. Mr. Ashworth having obtained the requisite licence, erected some tan-pits and a warehouse for hides, &c., and for a short time used the premises for the purposes of tanning. Before the making of these pits, there was an open channel running through his land, and communicating with a natural watercourse lower down the hill, on the slope of which the land lies, and during the few months of the tan-pits being used, the refuse from them was

drained into it. On its way to the watercourse it passes over an unleased portion of Lord Derby's land.

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In 1864, Mr. Ashworth underlet to the plaintiffs a portion of his land, through and along which the watercourse flowed, and this underlease contained the same reservation as the original lease from Lord Derby. Subsequently, the remainder of the property was sold by auction to Mr. Barrow, of Manchester, by whom it was leased to the defendant as a tenant from year to year. The defendant, after entering on his tenancy, commenced using the warehouse and pits for the purpose of curing hides, and threw the refuse down the channel before mentioned, whence it should have escaped into the watercourse. Meanwhile, however, the plaintiffs had arched over so much of the watercourse and channel as passed through the land underlet to them, and had extended their premises across the stream; and it was found that the water and refuse thrown into the channel did not escape, but (owing to a stoppage in the pipes in which that channel terminated) accumulated against the wall of one of the plaintiffs' buildings, and presently oozed through and caused the damage complained of in this action.

The jury found that the pipe was, in point of fact, stopped, but whether by the plaintiffs' default or not, they did not say; and the learned judge, being of opinion that the defendant had not any right to drain his refuse from the tan-pits into the channel, a verdict was entered for the plaintiffs, with leave to move to enter it for the defendant, on the ground that, on the construction of the leases and the finding of the jury, the judge should have directed the verdict to be so entered.

A rule nisi was afterwards obtained in pursuance of the leave reserved, and also for a new trial, on the ground of misdirection, in this, that the question of negligence was not properly left to the jury.

Feb. 9. *Temple, Q.C.*, and *W. R. Cole*, shewed cause. The reservation in the lease from Lord Derby only applies to water in its natural condition, and not to foul water; nor can refuse from tan-pits come under the denomination of "soil." Again, nothing more is reserved than the free running of water and soil from "contiguous lands and buildings." But this tainted water and

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refuse do not come from the unleased land of Lord Derby "contiguous" to the plaintiffs' premises. They come across it, but they arise beyond it.

[BRAMWELL, B. Surely the clause has reference to all water, &c., which lawfully is upon the contiguous land, no matter how it came there?]

Assuming that to be so, the words cannot be held to extend beyond natural water and such "soil" as it has been usual to send down through the channel; it cannot include the refuse of a manufactory. It had never before been used, with the exception of a very short period, for such a purpose. With regard to the stoppage in the pipe, it does not appear whose default had caused it, and the defendant, therefore, has not made out a case of contributory negligence. [The point on misdirection was not pressed.]

Brett, Q.C., and *Pope*, in support of the rule. The complaint alleged in the declaration is, not that the defendant poured foul water down the drain but, that he sent too much water, and that it accumulated in such a manner as to injure the plaintiffs. The defendant in reply contends that he has a right to the "free running of water and soil," without restriction. Unless he was permitted to drain off the refuse of the tan-pits through this channel, the licence to trade as a tanner would be nugatory. Both the clause empowering Lord Derby's tenant, with a licence, to carry on such a trade, and the fact of the lease being a building lease, make it necessary to put the widest construction on the terms of the reservation. Again, the damage was caused by the plaintiffs themselves; they should have removed the stoppage in the pipe or channel, which, though not found to have arisen from their default, was on their premises, and immediately under their notice.

Cur. adv. vult.

June 4. The judgment of the Court (Bramwell and Channell, BB.) was delivered by

BRAMWELL, B. We think this rule should be discharged. The plaintiffs' case on the declaration and in proof was that the defendant sent certain waste and refuse from tan-pits down a water-course, the outlet of which was a pipe through the plaintiffs' land;

that the pipe was stopped, the water accumulated, and damaged the plaintiffs. The defendant admitted this, but said he had a right to send the water and refuse down; and that, if the pipe was stopped, the plaintiffs, if they wished to avoid the accumulation of water, must themselves remove the stoppage. We agree in the latter part of the contention, and think the question is whether the right alleged by the defendant was proved by him. In fact, there was an old watercourse from his land over some unleased land of his lessor, Lord Derby, to the plaintiffs' land, and through it. For this watercourse the plaintiffs in their land had substituted a pipe. It is clear the defendant has the right to send all natural water down this course, and also all matters for which it has been used: *Pyer v. Carter*. (1) But it has not been used for tan-water and refuse, and therefore as to them the defendant must establish his right in some other way. He seeks to do so by shewing that Lord Derby, the plaintiffs' lessor, in the lease to them, reserved a right for the passage of water and soil, from the contiguous land over that leased to the plaintiffs, through water-courses and sewers. We think this would extend to all water and soil which lawfully was on the contiguous land, though it did not first arise there. But there are two objections to the defendant's case which we think fatal:—1st. It is not shewn that the defendant had any right as against Lord Derby to send this water and refuse on Lord Derby's adjoining land. 2nd. We think that this is not water or soil within the meaning of the reservation. We think these words mean water naturally falling or arising on, or elsewhere, and coming to, the contiguous land, and to such matters as are the product of the ordinary use of land for habitation, such as night-soil and sewage. We cannot think that under this word the landlord could use the contiguous land for any manufactory, and send the refuse, however offensive through the plaintiffs' sewers and watercourses: much less can the defendant do so.

Rule discharged.

Attorneys for plaintiffs: *Dangerfield & Fraser, for Hall, Manchester.*

Attorneys for defendant: *Wilkins, Blyth, & Marsland, for Marsland & Addleshaw, Manchester.*

(1) 1 H. & N. 916: 26 L. J. (Ex.) 258.

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June 4.

ATTORNEY GENERAL *v.* DAKIN AND OTHERS.*Royal Residence—Privilege—Sheriff—Process—Hampton Court Palace.*

Hampton Court Palace forms part of the royal demesnes of the Crown, and was formerly a royal residence, but has not been personally occupied by the sovereign since 10 Geo. 2. The state apartments are, and have been for many years past, used as a picture gallery; the pictures are the property of the Crown, but the public are admitted to view them gratuitously; the other apartments are occupied partly by officers of the palace, but principally by private persons, by the permission and at the pleasure of the Crown. The palace and grounds are maintained by the Crown, by its own officers and servants; a guard of honour is kept there, and service is performed in the Chapel Royal by a resident chaplain appointed by the Crown. The palace is under the control of a housekeeper appointed by the Crown, who has apartments in the palace.

A writ of *fi. fa.* having been executed in one of the suites of apartments occupied by private persons, and an information of intrusion having been filed against the sheriffs and their officers:—

Held per curiam, first, that the privilege of palace is attached to any place which is, in fact, the sovereign's residence; secondly, that actual personal residence at the time is not necessary to confer the privilege, if there be an intention to resume residence.

But *held* per Martin and Bramwell, BB., that in this case, the palace being so occupied that the Crown could not immediately resume occupation, such occupation of it was inconsistent with its being a royal residence, and that judgment should be for the defendants.

Per Kelly, C.B., that, considering that the palace was once a royal residence, its present use was not inconsistent with an intention in the Crown to resume residence, and that judgment should be for the Crown.

SPECIAL case stated pursuant to 22 & 23 Vict. c. 21, s. 10, on an information of intrusion filed by the Attorney General against the sheriffs of Middlesex and their officers, who had, on the 10th of February, 1865, executed a writ of *fi. fa.* in a suite of apartments in Hampton Court Palace, occupied by Lady Henry Gordon, the wife of the execution debtor.

The case stated the following facts: Hampton Court Palace has, from the time that it was presented to Henry VIII. in 1525 by Cardinal Wolsey, its builder, formed part of the royal demesnes of the Crown. It continued to be a place of occasional residence of the sovereign until the 10 Geo. 2, since which time no sovereign has personally occupied it.

A guard of honour is always on duty at the palace; sentinels

are posted at the various entrances, and those entrances are opened and closed at the pleasure of the Crown. Divine service is regularly performed in the Chapel Royal there by a chaplain appointed and paid by the Crown, who has apartments in the palace assigned for his residence. The sovereign has a pew in the chapel, which was a few years since used by the Prince of Wales when residing at the White Lodge, Richmond. On the demise of the sovereign or consort an achievement of the royal arms is affixed to the palace.

The palace and gardens are maintained by the Crown; the grapes grown in the vinery are used for the service of her Majesty's table; and the head gardener, commonly called the queen's gardener, and his three assistants, are appointed by the Lord Steward and paid out of the civil list in his department, and occupy official residences in the palace.

The palace contains a suite of rooms called state apartments, filled with pictures, the property of the Crown, and a room called the withdrawing-room, to all which the public are admitted under certain regulations; and for the last sixty years these apartments have not been used for any other purpose.

The housekeeper formerly employed servants to shew the pictures, and took fees for the view as a perquisite; but since the death of Lady Emily Montague, who held that office, the state apartments have been opened to the public gratuitously, under the superintendence of persons in the dress of police constables, appointed and paid by the Crown.

Other apartments in the palace are occupied by private persons; some of these consist of spacious rooms and offices, fit for the residence of persons with considerable household establishments, and are, and always have been, occupied by persons of rank and distinction; and others are occupied by persons of respectable station.

The officers now resident in the palace are, the master of the tennis court, who is paid partly from the second class of the civil list, and partly from the consolidated fund; the chaplain, who receives a salary from the privy purse, and obtains contributions from the occupants of the palace; and the housekeeper and head gardener, who are paid from the third class of the civil list, as settled by 1 Vict. c. 2, on her Majesty's accession.

With the exception of these persons, and some others similarly

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situated, the suites of apartments occupied by private persons are not enjoyed by them as appurtenant or annexed to any office under the Crown, but by virtue of a written warrant from the Lord Chamberlain to the housekeeper, directing her to deliver to the named person the keys and possession of "the following lodgings in her Majesty's Palace of Hampton Court," "which lodgings are to be inhabited by ———, or some part of her ladyship's family, a part of every year, or they will be considered vacant, and disposed of accordingly; and when the family are absent it is expected that one of their servants shall be left in the lodgings, or that they will leave the keys thereof with you or the housekeeper for the time being," &c.

These suites of apartments are entirely furnished by their occupants. Before possession is taken such repairs as the officers of the Crown consider necessary are done at the expense of the Crown; occasionally, where the repairs desired for the accommodation of the occupier have required a considerable outlay, they have been done at the joint expense of the Crown and the occupier; but all alterations or additional works required by the occupier are done at their own expense, and these have in some instances amounted to more than 1000*l*. Afterwards the occupiers are bound to do at their own expense whatever is necessary for preserving the apartments in a proper and tenantable condition, or whatever they may consider essential to their convenience; but no works or repairs are done except under the direction of the officers of her Majesty's Office of Works, and the government contracting tradesmen are employed and paid by the occupiers. Surveys of the apartments were formerly made, and notices to repair given periodically, but are now made and given in each instance as circumstances appear to require.

Many of these apartments communicate with the state apartments, and the doors of communication are kept locked; but if in the general care of the palace the housekeeper finds it necessary to do so, she has the power of opening the doors, and passing through the apartments. Some of the apartments have exclusive outward entrances opening upon the public highroad and barge walk.

The number of families now occupying apartments is from sixty

to seventy. The apartments are occupied by the grace and favour, and during the pleasure, of her Majesty, who can at will remove the occupants.

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The present is the first instance in which a *fi. fa.* has been executed, or attempted to be executed, within the palace. The defendants allege that writs of *capias* have been on several occasions executed within the palace, but they do not allege that the officers of the Crown knew of their execution; and the latter were not, in fact, till their attention was called to the seizure of Lord Henry Gordon's property, aware that any process of the superior courts had ever been executed within the palace without the previous permission of the Board of Green Cloth or the Lord Steward of her Majesty's Household. The defendants were unable to furnish the names of any parties arrested, or the dates when, or the particular parts of the palace where, any such arrests took place, the validity of such arrests not having been questioned, and no note therefore being taken of the matter. (1)

The question for the opinion of the Court was, whether the defendants were justified in executing the writ within the precincts of the Palace of Hampton Court?

May 10. *The Solicitor General* (*The Attorney General* and *McMahon* with him), appeared for the Crown; he cited *Reg. v. Ponsonby* (2); 2 Inst. p. 548, 549; 3 Inst. c. 45, p. 140; *Elder-ton's Case* (3); *Rex v. Stobbs* (4); *Winter v. Miles* (5); *Attorney General v. Donaldson* (6); *Strathmore v. Laing* (7); *Batson v. McLean* (8); and contended that actual residence of the sovereign was not necessary to confer the privilege.

Quain, Q.C. (*Day* with him), for the defendants, relied upon the same authorities, and cited *Hawkins*, P.C. vol. i. p. 61: he contended that the privilege was annexed to actual personal residence, that residence ceased when the acts of the sovereign indicated that there was no *animus revertendi*, and that such an indication was in

(1) The statements in the special case were mainly taken verbatim from *Reg. v. Ponsonby*, 3 Q. B. 14.

(2) 3 Q. B. 14.

(3) 3 Salk. 284; 6 Mod. 73; 2 Ld. Raym. 978.

(4) 3 T. R. 735.

(5) 10 East, 578.

(6) 10 M. & W. 117.

(7) 2 Wil. & Shaw, 1.

(8) 2 Chit. R. 51.

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this case given when the state apartments were turned into a public picture gallery, and the rest of the palace into private residences.

The Solicitor General, in reply.

Cur. adv. vult.

June 4. The following judgments were delivered, in which the arguments on both sides are fully stated :—

BRAMWELL, B. The question in this case is, whether the defendants, the sheriffs of Middlesex, are liable to proceedings of intrusion at the suit of the Crown, for executing a *fi. fa.* directed to them, on the goods of a private person at Hampton Court Palace, which is within their bailiwick? I am of opinion that they are not. It is clear it is no objection to the execution of such a writ, that it is executed in land, or a house, in which the Crown has an estate of freehold, or otherwise. It is also clear that it may be executed in a house in the occupation of the sovereign; that is to say, supposing it was her Majesty's pleasure to have a farm, and to allow her bailiff or servant to live in a house on it, in such case, though the occupation of the servant would be the occupation of the mistress, no doubt the writ could be executed. It is also clear, that the fact of Hampton Court Palace being a palace, or called a palace, is unimportant; that is to say, if her Majesty were pleased to demise it for a term, though it would continue as much a palace (as far as the building and name go) as before, process could be executed in it. On the other hand, if the sovereign should hire a house for a term as a residence, and occupy it as such, there can be no doubt that process could not be executed in it during such residence.

These considerations shew that what is called the privilege is not the privilege of the building, but of the person. There is, with respect, an apparently slight, but not unimportant, inaccuracy in Lord Ellenborough's expression, "Being then such palace, the question is, when did it cease to be so, and become no longer entitled to *its* former privileges?" (1) It is the privilege or right of the sovereign that her *residence* should not be invaded for the purpose of executing process. The question then is, not whether Hampton Court is a palace, nor whether it is in the occupation of

(1) *Winter v. Miles*, 10 East, at p. 579.

the sovereign, nor whether she could reside there if she pleased ; but whether it is her residence, that is to say, whether she does reside there, not at the very moment indeed, but either then or intending to return ; because no doubt Buckingham Palace is the residence of her Majesty, although she may at the moment be at Windsor. I think it cannot be said that she does reside there. The question hardly seems to admit of argument, but to be one of fact, and a question of fact to be dealt with on no technical considerations. Who, speaking popularly, would say that the queen resided at Hampton Court ? Her Majesty does not actually reside there, she neither sleeps nor takes her meals there, nor uses it for any personal purpose. On the contrary, she puts it to different uses, and could not reside in it herself without changing the use to which it is at present put. Some of the insignia or distinctions of a palace are kept up ; there is a chaplain, and service in the chapel, and sentinels at the gates. But all these things might be where the queen had never resided.

The great point made on the part of the Crown is, that this was once a residence, and it is asked when did it cease to be so, and where is the line to be drawn ? With submission, there is a great fallacy in this sort of argument. There may be a line, though I cannot say where ; and the thing may have ceased, though I cannot say when. It is difficult to say when day ends and night begins, or to draw the line between them, yet day and night are not the same thing. As to the authorities, it is obvious that this being a question of fact, there can be no authority in point unless the facts are identical. At the same time, much help may be got from former cases. As to the case of Kensington Palace (1), it obviously differed from this. The king's furniture was in the palace, and one of the king's sons lived there. If the king had come into actual residence, he could not be said to have revoked any use to which the palace was put. The expressions in the judgment in that case are, in my opinion, favourable to the defendants in this. With respect to the Holyrood case (2), it must be remembered it was considered on appeal by the light thrown upon it by the actual residence of the king immediately

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(1) *Winter v. Miles*, 10 East, 578.(2) *Strathmore v. Laing*, 2 Wil. & Shaw, 1.

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before that appeal. Further, it may be said the king must have a residence in Scotland, and that could only be at Holyrood. Still further, that palace had not been appropriated to other uses in the way this has been. *Reg. v. Ponsonby* (1) favours the plaintiff's contention. It is not necessary to protest one's desire to protect the queen's prerogative; but it seems to me, with great respect, that that prerogative is safer and more revered when it is not pushed to an unreasonable extent, as, I confess, I think it would be, if it were held to give some privilege to the bricks and stones of Hampton Court Palace to protect a debtor from the lawful process of his creditor.

MARTIN, B. I agree with my Brother Bramwell. I adopt the law as laid down by Lord Coke (2), Lord Holt (3), and the Court of Queen's Bench in *Winter v. Miles* (4); and I think that law is, that the queen's residence, or the queen's dwelling, is protected from the intrusion of the sheriff or any of his officers. Her own person and property are sacred and free of legal process; and it is but reasonable and right that persons living in her house, being there, and having property there, should in like manner be protected, in order to secure the sovereign from the intrusion of the sheriff's officers entering her dwelling to execute a writ. I think these three authorities establish that position, and that this protection ought to be given to the queen in the widest possible sense. It is not confined to the house or place where she actually happens to be living; but it is confined to what, in the common and ordinary understanding of mankind, is understood to be her residence and dwelling. It extends to Windsor and to Buckingham Palace; it extends to Osborne House; it would extend to Balmoral Castle if it were in England; it extends to every place at which the queen actually resided, or which is her dwelling or residence in the most enlarged sense. But when a place, though a royal palace, and formerly occupied by the royal family, has ceased entirely to be so occupied for a century, and there is no probability of the queen, in its present state, coming to reside there,

(1) 3 Q. B. 14.

(2) 3 Inst. c. 45, p. 140.

(3) *Elderton's Case*, 3 Salk. 284;

2 Ld. Raym. at p. 981.

(4) 10 East, 578.

in my judgment there is no privilege. It is a question of fact; and I am satisfied beyond all doubt that in no sense is Hampton Court Palace the residence or dwelling of the queen. She has thought fit to alter the nature and occupation of it; and instead of living there herself, she has been pleased of her bounty to appropriate it to the use of others by breaking it up, as the case states, into seventy different suites of apartments for different families. I do not think her so doing has the effect of enabling these persons to set their creditors and the law at defiance, and I am satisfied that her Majesty would be the last person in her kingdom to desire that such a state of things should exist. The judgment of Lord Ellenborough in *Winter v. Miles* (1), is satisfactory. The palace, in that instance, was Kensington Palace, where, at that time, the Duke of Sussex, the king's son, was living. The king's chamberlain had apartments there, and her furniture was in the house. Lord Ellenborough left the case to the jury as a matter of fact, and they found that this was a palace occupied by the king, which, in my judgment, was a right verdict. A rule was obtained for a new trial, on the ground that the jury had come to a wrong conclusion. In delivering judgment on that rule Lord Ellenborough states, apparently with approval, what Lord Holt had held, viz. that where there was a total absence of the royal family, "where the queen (Queen Anne) was neither present in person, nor by her domestics, or any of her family, the place was not privileged;" and he goes on himself to say, "It would be difficult to say that such a place would be entitled to the privileges of a royal palace; and much more so if the palace was so occupied by others as that his Majesty could not immediately return and reside there in his own person, if he were pleased to do so." (2) That is the test put by Lord Holt, and adopted by the Court of Queen's Bench.

It seems to me, therefore, that I am to ask myself—is the Palace of Hampton Court so occupied by others as that the queen could not immediately return and reside there in her own person, if she were pleased to do so? Now it is evident how it is occupied. There are state rooms, where pictures are shewn, and which are now open to the public by the favour of the queen; these apart-

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(1) 10 East, at p. 579.

(2) At p. 580.

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ments are totally unfit for the queen's occupation, and it would be impossible for her to occupy them as her dwelling. If she were to occupy the palace, she would require to have the present occupants removed; they, in fact, really and substantially occupy it. As to the circumstances that there is a chapel, and that service is performed there, I do not attach any importance to them; the chaplain probably has some endowment and lives at the palace. The housekeeper has, indeed, a master-key, by means of which she can go through all the apartments; but how does that affect the real substantial circumstance that there are seventy sets of chambers or apartments in this palace, occupied by different families? Lord Ellenborough, at the conclusion of his judgment, says (1), "Had it, indeed, distinctly appeared in evidence, that the immediate personal residence of his Majesty was, by means of any occupation of the palace incompatible therewith, rendered impracticable, we might have formed a very different conclusion on the subject before us. And whenever a case so circumstanced shall occur, the Court will not feel itself bound by anything now laid down from directing a jury that the exemption in question ought in such a case to be disallowed." Now I think the statement in the case establishes that the immediate personal residence of the queen at Hampton Court is, by means of the occupation of the palace by others, rendered impracticable, and that therefore the privilege does not exist. I will only add that if the queen changed her mind, and chose to occupy Hampton Court as her residence, in my opinion the privilege would immediately attach, as it would attach on any other house in the kingdom which she thought fit to occupy. The law gives the privilege, if it be called a privilege—I should call it "legal right"—in the widest possible extent; but it seems to me it would not be fit and right to extend it to Hampton Court, where for upwards of one hundred years no member of the royal family has lived.

In my opinion, therefore, the judgment ought to be for the defendants.

KELLY, C.B. The single question in this case is, whether the Palace of Hampton Court has lost the privilege of the immunity

from the execution of civil process within it, by reason of the sovereignty of England having ceased to reside there for a very considerable length of time, but without abandoning the possession, or control, or regulation of it as a royal palace, and still retaining the power to return to it and actually to reside in it, at the royal pleasure.

I am of opinion that this privilege still exists, and that every royal palace in which the sovereigns of this kingdom have once resided, and may come to reside again, and which is actually occupied, and kept up and maintained in a fit and proper condition, by the officers and servants and at the expense of the sovereign, is entitled to and retains this privilege, which attaches to the palace itself as long as it is the property and in the actual or constructive occupation of the sovereign. Personal and continuous residence is not necessary; it is enough that the sovereign, past or present, has resided there, and may come to reside there at a future period. Such is the result of all the authorities. We find in the 3rd Inst. pp. 140-41, "The king's palace at Westminster hath this liberty and privilege, viz. nullæ citationes aut summonitiones liceant fieri cuicunque infrâ palatium Regis Westmonasteriense;" and that in the case of *Matilda de Nyerforde v. John Earl of Warren, and Johan de Barro Countess of Warren*, it was, upon full examination of the cause, adjudged in parliament in these words:—"Quod prædictum palacium domini regis est locus exemptus ab omni jurisdictione ordinariâ, tam regiæ dignitatis et coronæ suæ [ratione], quam libertatis ecclesiæ Westmonasteriensis, et maximè in præsentia ipsius domini regis tempore parliamenti sui ibidem: Ita quod nullus summonitiones, seu citationes, ibidem faciat." And Lord Coke proceeds thus: "Here two things are principally to be observed; first, that this royal privilege is not only appropriated to the palace of Westminster, but to all the king's palaces where his royal person resides; secondly, that this privilege is, to be exempted from all ecclesiastical jurisdiction,—regiæ dignitatis et coronæ suæ ratione." It is to be observed that the words of the resolution of the High Court of Parliament are at once clear and unconditional: "That the aforesaid palace of our lord the king is a place exempt from all ordinary jurisdiction." Here no residence at all is alluded to; and this is followed by the words "maximè in præ-

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sentia ipsius domini regis tempore parlamenti sui ibidem." Lord Coke, indeed, after observing that this applies to all the king's palaces, certainly adds, "where his royal person resides." This, however, I think must be held to apply to a constructive as well as to an actual and personal residence, as appears by the case of Holyrood Palace, where there had been no actual residence for more than 150 years; and of Kensington Palace, where the sovereign had ceased to reside for a period of forty-six years.

Elderton's Case (1) is next to be considered. There it was resolved by Powell, Powys, and Gould, JJ., that the privilege of the Palace of Whitehall remained, though the queen (and this case occurred in the second year of the reign of Queen Anne) were not resident; and Holt, C.J., says (2), "If the court be kept there, though the queen's person be not present, it is a residence; but when the queen and the whole court and all the officers be removed, has it then the privilege of a palace?" And in the report in 3 Salk. 284, Lord Holt also says, that "where the queen was neither present in person, nor by her domestics, or any of her family, the place was not privileged." This decision, the first to be found after that of the Earl of Warren in the reign of Edward I., is a clear authority in favour of the Crown in this case of Hampton Court. It was held without qualification by three judges out of four, that the privilege continued although the queen was not resident; and the dictum of Lord Holt, that where the queen was not present in person, nor by her domestics, nor by any of her family, the place was not privileged, has obviously no application to the present case, in which the palace is in the present occupation of the queen by her officers and servants, who have an uncontrolled possession of the entire palace, with its outbuildings, gardens, and grounds, with the exception only of the apartments in which the queen has permitted certain favoured persons to reside, and to which her Majesty's house-keeper and servants have free access, and which apartments themselves her Majesty may re-enter and re-possess herself of at any moment when it may be her pleasure to do so.

We have next to consider the case of *Winter v. Miles* (3),

(1) 2 Ld. Raym. 978; 3 Salk. 284;
6 Mod. 73.

(2) At 2 Ld. Raym. p. 981.

(3) 10 East, 578.

where it was held by the Court of Queen's Bench, in 1809, that this privilege attached to the Royal Palace of Kensington. This had ceased to be a royal residence at the death of George II. Nearly half a century had therefore elapsed, and if the same question were to arise now, more than a century would have elapsed since any sovereign had actually resided in this palace. Yet it is clear that the privilege attached and still attaches to it, and continues unimpaired. Lord Ellenborough, in delivering judgment in that case, expresses himself thus (1): "Being then such palace, the question is, when did it cease to be so, and become no longer entitled to its former privileges?" If the same question be asked now as to the Palace of Hampton Court, how would it be answered? When did it cease to be a royal palace entitled to this privilege? It is indeed said in that case that there were certain state apartments reserved for his Majesty and his officers, and that the palace was kept up fit for his Majesty's reception if he should choose to visit it; and much reliance, in the argument, was placed upon that part of the case. But so here, a range of apartments exists, much more extensive than any which Kensington Palace contains, of which, if there be any occupier or occupation at all, her Majesty is in the sole and exclusive occupation, and which could be made ready for her Majesty's reception and personal residence there, as easily and expeditiously as any suite of apartments in Kensington Palace. So, it certainly appeared that the late Duke of Sussex, in 1809, occupied apartments in Kensington Palace. But surely it can make no difference whether a suite of apartments in which her Majesty is pleased to allow one of her subjects to reside, is occupied by a prince of the blood who has an income and an establishment provided for him by parliament, or by a nobleman or gentleman and his family, upon whom the queen may have been pleased to confer the same favour. Finally, it is urged that Lord Ellenborough observed, that if it had distinctly appeared that the immediate personal residence of the king was, "by means of any occupation of the palace incompatible therewith, rendered impracticable," a different conclusion might have been arrived at. But there is nothing upon this case as stated that tends to shew that personal residence of the queen

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at Hampton Court is in any degree impracticable. The occupation of the residents in the various apartments of the palace might be determined at any moment; and even without disturbing any of its present occupants, the place might, and indeed may, be made the actual residence of the queen, or of some member of the royal family who may desire to reside there.

We have next the case of the Palace of Holyrood, as decided in *The Earl and Countess of Strathmore v. Laing*. (1) There it was held that the palace was privileged against the execution of civil process within it, although at the time when the question arose, in 1820, no sovereign of England or Scotland had ever entered it since the time of the Stuarts; and it had not been actually a royal residence since the union of the two crowns in the person of James I. Lord Gifford, in advising the House of Lords in that case, treated the law of England and Scotland as the same, and observed (2): "This privilege is given, not merely because otherwise the king might be deprived of the services of his domestics, but that it is not seemly that the royal palace or the royal presence should be exposed to be made a scene of disturbance and confusion." Then, after adverting to the case of Kensington Palace, in which it had also been held that actual residence was not necessary, and that the privilege continued, his lordship holds it "unquestionable that Holyrood House has not been abandoned as a royal palace by his Majesty, and that the actual presence of the king is not necessary to preserve the existence of the privilege."

The attention of the Court has also been called to the case of *Reg. v. Ponsonby* (3), in which the occupiers of apartments in this palace of Hampton Court were held rateable to the poor rate; but I am of opinion that the queen's prerogative cannot be impaired or affected by any liability which may be imposed by the poor laws upon a subject.

This privilege belongs to a royal palace, and is part and parcel of the royal prerogative, *regiæ dignitatis et coronæ suæ ratione*; and it is impossible not to see that executions, whether against the person or the property of a subject, executed in any place which is, or at any time might become, a royal residence, is calculated to offend the dignity and invade and disturb the personal comfort and

(1) 2 Wil. & Shaw, 1.

(2) At p. 6.

(3) 3 Q. B. 14.

privacy of the sovereign. It must of necessity, therefore, extend to every royal palace which has not been absolutely abandoned as a residence by the sovereign. Can it then become a question in the case of any royal palace whatever, whether it may or may not be the intention or pleasure of the sovereign to come and reside there in person? Lord Ellenborough justly observes (1): "The question of the discontinuance of any place as a palace of residence, which had at any time been so used by the sovereign upon the throne, might involve in its discussion many extremely delicate circumstances. It would not be a very seemly matter for inquiry, whether his Majesty had by any, and by what, manifestations of his royal will, indicated a purpose of not returning to any particular palace." May it not then be asked at the present moment—Who can tell, without entering upon this unseemly and unbecoming inquiry, how soon it may be her Majesty's pleasure to come and take up her residence, for a longer or a shorter period of time, actual and personal, within this Palace of Hampton Court? This question might have been asked in 1820 in the case of Holyrood Palace, which, after having ceased to be a royal residence for two centuries, was actually visited and occupied as the court of the king, two years afterwards, by George IV.

All the circumstances which constitute constructive occupation unite and concur in the present case, in shewing a continued legal possession on the part of her present Majesty. The large state apartments, the gallery, the withdrawing-room, the grand entrance, the royal chapel, the extensive outbuildings, the gardens, and the park, are all in the legal possession of her Majesty, and under the actual care, direction, and management of her Majesty's servants. A guard of honour and sentinels are stationed at various parts of the palace. The Chapel Royal is maintained, and divine service is performed there regularly by the royal chaplain, who lives within the palace, and the royal pew there has been occupied by the Prince of Wales. The palace in all respects possesses the character and appearance of a royal palace, and is in no other respect distinguishable from Windsor Castle, or St. James's, or Buckingham Palace, than that her Majesty does not at present personally reside there, and that certain suites of apartments in it are occupied by

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(1) 10 East, at p. 581.

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others under her Majesty's permission, but only during her Majesty's pleasure, which is indeed the case both at St. James's and at Kensington.

Under these circumstances, I am clearly of opinion that the immunity against the execution of civil process exists, that the entry of the defendants was an unlawful intrusion, and that the Crown is entitled to the judgment of the Court.

My learned brethren, being, however, of a contrary opinion, the judgment must be entered for the defendants.

Judgment for the defendants.

Attorney for the Crown: *Solicitor to the Board of Works.*

Attorneys for defendants: *Burchell & Hall.*

May 31.

MERCER v. PETERSON.

Bill of Sale—Agreement to give Bill—Fraudulent preference—Act of Bankruptcy—Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 67.

A trader, being indebted to the defendant, gave his acceptance to him for the amount of the debt. Three days before the acceptance was due, he agreed to give the defendant a bill of sale upon all his goods, chattels, and stock-in-trade, in consideration of the defendant taking up the acceptance, and in order to cover any further advance which might be made to him by the defendant. The defendant accordingly took up the acceptance, and afterwards lent an additional sum to the trader. A bill of sale was subsequently executed in pursuance of the agreement, whereby the whole of the trader's personal estate, of which he was then, or should in future, become possessed, was assigned to the defendant, as security for the debt due from the trader to him. Less than twelve months from the date of this bill of sale, but more than twelve months from the date of the agreement to give it, the trader was adjudicated bankrupt. In an action of trover by the assignee in bankruptcy against the defendant for the goods included in the bill of sale:—

Held, that the bill of sale conferred a good title to them on the defendant as against the plaintiff

DECLARATION. 1st count, for the wrongful conversion by the defendant of the goods and chattels of one John Jones, before he became bankrupt; 2nd count, for the wrongful conversion of the goods and chattels of the plaintiff, as assignee of Jones; 3rd count,

for money payable by the defendant to the plaintiff, as such assignee, for money had and received.

Pleas to the 1st and 2nd counts, not guilty, and traverses of the possession of the goods in the 1st count mentioned, by Jones, and of those in the 2nd count mentioned, by the plaintiff. To the 3rd count, never indebted. Issue.

The cause was tried before Pigott, B., at the last Gloucestershire spring assizes, when a verdict was found, by consent, for the plaintiff for 115*l.*, with leave to move to enter a verdict for the defendant on admissions of fact, which were as follows:—

The plaintiff was creditors' assignee of John Jones, who was adjudicated bankrupt, on the plaintiff's petition, on the 31st of December, 1866. On the 25th of October, 1865, Jones was indebted to the defendant in the sum of 107*l.* 8*s.* 4*d.*, for goods sold and delivered, and money lent. Jones, on the same day, gave the defendant his acceptance for that amount, to become due on the 12th of December following. On the 9th of December, Jones applied to the defendant to advance him the money to take up the bill. The defendant refused to do so unless he would give an undertaking to execute a bill of sale, to secure the repayment of the amount. The following agreement was accordingly drawn out, and signed by Jones, and by the defendant:—

“Dec. 9, 1865. An agreement made between John Jones of the one part, and Thomas Peterson of the other part. The said Thomas Peterson having agreed to lend me 107*l.*, to pay my acceptance becoming due on the 12th of December instant, upon my agreeing to give him a security for the same upon my goods and chattels, and stock-in-trade, I hereby agree to give him a mortgage of the same accordingly, and for any further money he may lend me. (Signed) John Jones. Thomas Peterson.”

Jones's acceptance had been previously left by the defendant with his bankers for collection, and was afterwards, when due, paid by the defendant with the money mentioned in the agreement as having been advanced to Jones. On the 6th of January, 1866, Jones applied to the defendant to advance, and the defendant did advance, 64*l.* 11*s.* 8*d.* upon the understanding that this should be included in the bill of sale. The bill of sale was given on the

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27th of the same month, and after reciting the existence and total amount of the debt due from Jones to the defendant, and the agreement to secure it, together with any further moneys advanced in the manner thereafter mentioned, it was thereby witnessed that Jones assigned to the defendant the whole of his household goods, furniture, stock-in-trade, and effects then upon, or which should thereafter be upon, his premises, and also his book debts, and all other the personal estate to which he was then or should (so long as any moneys remained payable to the defendant) at any time thereafter be entitled. The bill of sale also contained a clause empowering the defendant, in case of default being made by Jones in the payment on demand of the money due, to seize and dispose of the goods and chattels included in it.

The debt at this time due from Jones to the defendant was 172*l.* and no further advance was made. At the time of the execution of the bill of sale (which was duly registered) Jones was a trader, and possessed of no property except such as was comprised in it. He was also at that time indebted to persons other than the defendant to the amount of about 300*l.*, the whole or greater part of which he was also liable to pay on the 9th of December, 1865.

On the 6th of February, 1866, the defendant demanded payment under the bill of sale. On the 10th of February, payment not having been made, he took possession of the goods mentioned in the bill, and sold all of them by auction, except goods to the value of about 90*l.*, seized by Jones's landlord for rent in arrear. A portion of the goods included in the bill worth 21*l.* had been acquired by Jones after the 9th of December, 1865.

After the seizure of Jones's goods by the defendant, Jones was left with no property whatever, and at the date of his bankruptcy returned in his balance-sheet, as the truth was, that he had no assets of any description. (1)

(1) The 12 & 13 Vict. c. 106, s. 67, enacts (*inter alia*) that if any trader liable to become bankrupt shall make any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or shall make any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defeat or delay his creditors, he shall be

deemed thereby to have committed an act of bankruptcy. Sect. 88 enacts that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the filing of any petition for adjudication of bankruptcy against him.

In Easter Term last, *Cooke, Q.C.*, obtained a rule nisi on the above admissions, to enter the verdict for the defendant on the ground that the bill of sale was not fraudulent, or void, or an act of bankruptcy, or that, assuming it to be an act of bankruptcy, it must be taken to have happened at the date of the agreement, and therefore more than twelve months before adjudication.

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Macnamara shewed cause. The bill, taken by itself, being a transfer of the whole of the debtor's property in consideration of a bygone debt, is clearly fraudulent and an act of bankruptcy, and the debtor was liable to become bankrupt upon it, as it was committed within twelve months of the petition for adjudication being filed. But then it is said that the bill is valid because it was made in pursuance of the agreement of the 9th of December, 1865, which was more than twelve months before the petition. Assuming that to be the case, the test of validity is this: would the bill of sale, if it had been given on the same day as the agreement, have been valid against the assignee? Griffiths and Holmes on Bankruptcy, vol. i. p. 122: *Hutton v. Cruttwell*. (1) It would not in this case, because the agreement was made in consideration of a past liability.

[MARTIN, B. There was an actual further advance after the date of the agreement, and before the date of the bill.]

That circumstance does not affect the question, unless there was in the agreement an *obligation* to make it. Here there was no such obligation, although the terms of the agreement contemplate the possibility of a future advance being made. The case is the same as if the whole debt were past. In Griffiths and Holmes on Bankruptcy, vol. i. p. 116, it is said that an assignment, by way of mortgage, is bad if the purpose be really to secure past advances, even though there may be an apparent intention to make further advances. In *Lindon v. Sharp* (2), further advances were actually made, after an assignment of all his property by a debtor, but as there was no *stipulation* in the assignment for making them, the assignment was held to be an act of bankruptcy. There is a material distinction between a *sale* for money and a mortgage for

(1) 1 E. & B. 15.

(2) 6 M. & G. 895.

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an advance: *Bittleston v. Cooke*. (1) The latter, to be valid, must be for the advantage of the general creditors. The advance must not be appropriated to the payment of one individual creditor: *Butcher v. Easto*. (2) In *Harris v. Rickett* (3), the assignment was *wholly* for a future advance, of which there was no reason to suppose the general body of creditors would fail to have the benefit; and in *Hutton v. Cruttwell* (4), the trader derived the full advantage of the whole sum advanced. But in *Graham v. Chapman* (5), a case similar to the present, an assignment of the debtor's stock, &c., including future acquired property, in consideration partly of a past debt, and partly of a present advance, was held to be an act of bankruptcy, because it necessarily tended to defeat and delay creditors. For these reasons the plaintiff is entitled to retain his verdict, but assuming the bill to be valid, it is only valid to the same extent as the agreement, and does not deprive the plaintiff of his right to future acquired property, which is found to be 21*l.* in value. In any event, therefore, he must retain his verdict for that amount.

Cooke, Q.C. (*J. O. Griffiths* with him), in support of the rule, contended that the object of giving the bill was not to defeat or delay creditors, but to carry out the agreement of the 9th of December, 1865, which was really beneficial to them, as it probably prevented an immediate bankruptcy. The whole question turned on the intention of the trader: *Bills v. Smith*. (6) In this case he had given the bill in order to discharge an obligation to do so entered into by him, without any view of giving a preference to one creditor over another. In *Graham v. Chapman* (5), the inevitable consequence of the assignment was to defeat or delay creditors.

KELLY, C.B. I am of opinion that this rule should be made absolute. The first question for consideration is whether the giving of a bill of sale such as was given here, is an act of bankruptcy. Now, under the circumstances of the case, the bill must be taken as having been given and as being dated on the 9th of

(1) 6 E. & B. 296.

(2) 1 Doug. 294.

(3) 4 H. & N. 1; 28 L. J. (Ex.) 197.

(4) 1 E. & B. 15.

(5) 12 C. B. 85.

(6) 34 L. J. (Q.B.) 68.

December, 1865. My Brother Martin refers me to an authority on this point in Messrs. Griffiths & Holmes' work on Bankruptcy, vol. i. p. 123, but really no authority is needed in support of the proposition that if there be, on a certain day, as, for instance, on the 9th of December, 1865, a bonâ fide agreement, founded on a good consideration, for the subsequent giving of a bill of sale, and if that bill be afterwards given accordingly, then, when thus given, it has a retrospective effect, and must be considered as having been made on the day on which the agreement was entered into. Regarding this bill of sale, therefore, as being dated on the 9th of December, 1865, there is an end of the question as to its being per se an act of bankruptcy, because it was given more than a year before the date of the adjudication.

The remaining question is whether we ought to say that this security is invalid or fraudulent as against the plaintiff. I do not think that we ought, for nothing can be clearer than that the transaction was an honest one, and, indeed, one which, at the time it was made, was beneficial to all the creditors. It is very probable that, if the debtor had not obtained the advance to meet this acceptance, he might have immediately become bankrupt instead of at the interval of twelve months. This agreement, therefore, appears to me to be good and valid, and founded on an honest consideration, that, namely, of what I regard as a present advance of money to the debtor. This being so, we must, in my opinion, uphold it, and make this rule absolute to enter a verdict for the defendant.

MARTIN, B. I am of the same opinion. In order to succeed, the plaintiff must establish that, within twelve months of the adjudication, an act of bankruptcy was committed. Within that period there must be shewn to have been a "fraudulent grant or conveyance with intent to defeat or delay creditors." I see nothing of the sort in this case. The truth is, that more than twelve months before adjudication the debtor entered into this agreement, and subsequently there was a further actual advance of money and the execution of the bill of sale. Now, in my judgment, by no possible construction can this transaction be made out to be a fraudulent grant of his goods by the debtor with intent to defeat

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or delay his creditors within twelve months of the time when he was adjudicated bankrupt. The rule must, therefore, be made absolute.

CHANNELL, B. I am also of opinion that this rule should be made absolute. There is no ground for impugning the bona fides of the debtor, and at the time he entered into this agreement there was no intention on his part, or on the part of the defendant, to defeat or delay his creditors. On the contrary, the intention of both parties may well have been to keep the debtor afloat, and enable him to continue his business. If so, then there being no fraud in the conduct of the parties, the deed can only be void in consequence of its contravening the law of bankruptcy. Is the deed then void on that ground? In other words, is it an act of bankruptcy? I think it is not. Assuming for a moment that there was no earlier agreement, even then the bill of sale could only be an act of bankruptcy, because it was made within twelve months of adjudication. But we must not dissociate the bill from the agreement. Now, that agreement was for an advance, which we may take for the present purpose as equivalent to the value of the goods transferred. It does not appear to me to make any difference that the advance was intended to meet the acceptance about to fall due. It is said, indeed, that if it was so intended, if from the first it was fettered and controlled, the agreement would thereby be invalidated. But that would not, in my opinion, render it void, because the fact of the acceptance being provided for by the advance may have kept the bankrupt from immediate insolvency. It has been contended that we may separate the agreement from the bill of sale, because the latter is larger than the former. The bill, however, had direct reference to the agreement; and although it was to operate on further advances, still the agreement itself contemplated such further advances being made. The two things cannot be dissociated, and must be considered as forming part of the same transaction.

KELLY, C.B., in reply to *Macnamara*, stated that the Court did not think the plaintiff entitled to retain the verdict for 21*l.*, the value of property acquired after the date of the agreement. The

rule was to be made absolute generally, to enter a verdict for the defendant.

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Attorney for plaintiff: *J. H. F. Lewis, for Wilkes, Gloucester.*

Attorneys for defendant: *Cree & Last, for Edmund Edmonds, Gloucester.*

STUBBS, ADMINISTRATOR v. THE HOLYWELL RAILWAY COMPANY.

June 4.

Contract for Personal Services—Effect of Death—Vested Right of Action.

Although a contract involving personal confidence is put an end to by the death of the party confided in, it is not thereby rescinded so as to take away a right of action already vested.

The defendants employed S. as consulting engineer for fifteen months to complete certain works. S. was to be paid 500*l.* for his services in equal quarterly instalments. Before the work was finished, and whilst two quarterly instalments which were due to him were still unpaid, he died:—

Held, that his personal representative was entitled to recover them.

DECLARATION for money payable by the defendants to the plaintiff as administrator of William Stubbs, deceased, for work done by the said William Stubbs, in his lifetime for the defendants, at their request, and fees, &c., payable in respect thereof, for money paid by the said William Stubbs in his lifetime for the defendants, at their request, and for money due on accounts stated between the said William Stubbs in his lifetime and the defendants, and for money due on accounts stated between the plaintiff as administrator and the defendants.

Pleas. Never indebted, and payment. Issue thereon.

The cause was tried before Mellor, J., at the last Liverpool spring assizes, when the following facts were proved:—

In December, 1865, William Stubbs, the deceased, was appointed consulting engineer by the defendants, to complete the construction of certain works on their line. The work was to be completed in fifteen months from the 5th December, and the defendants were to pay Stubbs 500*l.* as his fee or salary for performing it, by five equal quarterly instalments. He was also to be paid his travelling expenses. The work was commenced on these terms, and the first quarterly payment of 100*l.* was made in March, 1866. Stubbs

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continued in his employment for two quarters more. Soon after the end of the third quarter, and before any payment beyond the 100*l.* had been made to him, he died intestate. Less than three-fifths of the whole work had been done, but no default on the part of the deceased was proved. The plaintiff, his administrator, now sought to recover two instalments of 100*l.* each for the second and third quarters' work, and also 10*l.* for travelling expenses incurred by the deceased. The defendants contended, however, that they were only liable on a quantum meruit for the amount of work actually done during the second and third quarters. The jury found the actual value of the work done to be 150*l.* A verdict was entered for the plaintiff for 210*l.*, being the full amount claimed, viz. 200*l.* for the two quarterly instalments, and 10*l.* for travelling expenses. Leave was reserved to the defendants to reduce the damages to 160*l.*, on the ground that the death of Mr. Stubbs dissolved the contract, and that the contract being dissolved, the plaintiff was only entitled to recover on a quantum meruit for the work actually done.

A rule nisi having been obtained accordingly,

R. G. Williams shewed cause. This was a contract for personal services, and therefore was no doubt dissolved by death. But the death of Mr. Stubbs does not deprive his administrator of a right to recover what he himself, had he lived, could have recovered. At the time of his death he had a vested right of action for this 200*l.*, and his death cannot affect that right.

[CHANNELL, B. Actually earned commission is recoverable notwithstanding the death of the party who has earned it.]

The money here was actually earned by Mr. Stubbs. It was payable to him before his death. The case is similar to one in which freight on a cargo has been prepaid, when the party paying it cannot get it back though the cargo is lost on the voyage. The loss of the cargo in the one case, and the death of one of the parties in the other, are contingencies against which provision should be made expressly: *Carr v. Wallachian and Petroleum Company*. (1)

Holker, in support of the rule. This case is not analogous to those in which a servant is paid by time. But there was an entire

(1) Law Rep. 1 C. P. 636.

contract between the defendants and the deceased that they should pay him so much for a certain work; and for his convenience the amount was to be paid by instalments. The contract, however, being for personal services, was rescinded and put an end to by the death of Mr. Stubbs, and nothing can be recovered by his administrator under it. The defendants are liable to do no more than pay for the work actually done on a quantum meruit: *Smith's Leading Cases*, 6th ed. vol. ii. pp. 34—36. Suppose Mr. Stubbs had refused to continue to work at the end of the third quarter, he could not then have recovered the full amount of the previous instalments; and an incapacity to perform the residue of the work, caused by death, is equivalent to an absolute refusal to perform. The contract in either case must be treated as gone from the time of its originally being made: *Smith's Leading Cases*, 6th ed. vol. ii. p. 10, citing *Planché v. Colburn* (1), and *Withers v. Reynolds* (2), and what has already been done must not be treated as having been done under the contract. Death, like a refusal to perform, rescinds the contract *ab initio*. The plaintiff, therefore, cannot recover the whole amount claimed because that assumes the contract to be still in existence.

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KELLY, C.B. I am of opinion that this rule should be discharged, and that the plaintiff is entitled to a verdict for 210*l*. He sues as the administrator of a person named Stubbs, who had in his lifetime entered into a contract to perform certain work for the defendants in fifteen months for 500*l*., payable under the contract in five quarterly instalments of 100*l*. each. The deceased, it appears, performed one quarter's work, and at the close of that quarter received 100*l*. in payment. He then performed his work during the second and third quarters, and at the expiration of the third quarter became entitled to two further instalments of 100*l*. each. These were due to him under the contract, and a right of action for them vested in him on the morning of the 6th of September, 1865. Soon afterwards he died, whilst these instalments remained unpaid. His death, no doubt, dissolved the contract. But it did not divest his representative of the right of action, which had already accrued to the deceased, and which sur-

(1) 8 Bing. 14.

(2) 2 B. & Ad. 882.

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vived to that representative. Whether circumstances existed, or may be conceived to have existed, which would have enabled the defendants to maintain a cross action against Stubbs, or even against his administrator, is immaterial to the present question. Here is a perfect right of action vested in the deceased at the time of his death, which survives to the plaintiff. He is, therefore, entitled to recover, there being no plea alleging that the deceased did not perform his work, nor any proof of non-performance.

MARTIN, B. I am of the same opinion. The law on the subject is clear and free from doubt. Suppose a man enters into a contract to do a certain piece of work for a certain sum, then if he die before he completes it, he can recover nothing, not even if before his death he had done nine-tenths of it. For the contract was for the whole work, and not for nine-tenths of it. But suppose that the contract is for the performance of a certain piece of work for a certain sum, to be paid at the rate, say of 50*l.* a month, then the person employed earns 50*l.* at the end of each successive month. It is true that if, after doing a portion of the work, he refused to do the rest, he might not be able to recover, because he could not prove that he was ready and willing to perform his part of the contract. But such a case as the present has no analogy with that of a refusal by the person employed to continue performance. The contract, no doubt, is ended by the death of Stubbs, but only in this sense, that the act of God has made further performance impossible. The man's life was an implied condition of the contract, but the fact of his death can have nothing whatever to do with the payment due for what has been done—with what has been actually earned by the deceased. The contract had, it is true, an implied condition that he should live for fifteen months. But his death does not throw back his representative upon the right of recovering on a quantum meruit only. He can recover the stipulated price, due to the deceased when he died, of the work the deceased had actually executed. No vested right of action is taken away by death. The contract is at an end, but it is not "rescinded," for rescission is the act of two parties, not of one. With regard to the remarks quoted from Smith's Leading Cases, I may say, with the greatest respect for the learned author,

that some of the positions laid down by him in the note to *Cutter v. Powell*, in his leading cases, 6th ed. vol. ii. p. 1, are not, in my opinion, fully supported by the authorities.

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CHANNELL, B. I am of the same opinion. It is not denied that this contract was one of personal confidence. That being so, on the death of Stubbs it was at an end, so far as the future was concerned. But although that be so, we are not to prevent what was done during his life, under the contract, from having its proper effect. This is not the case of a contract rescinded, but of a contract in its circumstances conditional on the life of one of the parties to it continuing for a certain period. On his death it became void. It became null for the future, but no more. The administrator might have it incumbent on him in some circumstances to shew that the deceased was ready and willing during his lifetime to continue performance of the contract, or else it might be said that no right of action had vested. But in this case there is no pretence for saying that the work was not actually done by the deceased. A right of action for the price agreed upon, therefore, vested in him, and I can see nothing to prevent the bringing of this action by his representative to enforce that right.

Rule discharged.

Attorneys for plaintiff: *Chester & Urquhart, for A. Wright, Liverpool.*

Attorneys for defendants: *Marshall, Westall, & Roberts, for Lace, Banner, & Co.*

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June 6.

WINTERBOTTOM v. LORD DERBY.

Public Way—Action for Obstruction—Special Damage—Dedication—Evidence of User—Practice as to entering Verdict on leave reserved.

In order to maintain an action for obstructing a public way, the plaintiff must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way.

In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction:—

Held, that he was not entitled to maintain the action.

In order to prove that the way was in fact public, evidence was given of acts of user extending over nearly seventy years; but during the whole period the land crossed by the way had been on lease. The judge told the jury that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public by the defendant or his ancestor, at a time anterior to the land being leased:—

Held, a proper direction.

Where leave is reserved by a judge at nisi prius to enter a nonsuit, the Court will, notwithstanding the leave reserved being thus restricted in point of form, order a verdict to be entered for the defendant on one issue without disturbing the verdict found for the plaintiff on another, if that course seems most consistent with doing justice between the parties.

DECLARATION. That the defendant on divers days wrongfully obstructed a certain public footway, in the township of Pilkington, in the parish of Prestwich, in the county of Lancaster, by placing upon and across the said footway, in divers places, posts, rails, and fences, whereby the plaintiff was on divers days hindered and prevented from passing and repassing over and along the said footway, and using the same, and was obliged to incur, and did incur, on divers days, great expense in and about removing the said obstructions, in order that he might, and before he could, pass and repass over and along the said footway, and use the same in and about his lawful business and affairs, and was greatly hindered and delayed in and about the same.

Pleas: 1. Not guilty; 2. Traverse that the footway was a public footway. Issue thereon.

The action was brought to try the right of the public to use a

footway across some property belonging to the Earl of Derby, leading from a lane called Park Lane, in the township of Pilkington, to Prestwich, and thence to Manchester. At the trial before Mellor, J., at the last Manchester spring assizes, it was proved that the plaintiff, who resided near Manchester, had from time to time made use of the footway without any objection on the part of the defendant or his agent. About three years ago, however, the defendant's agent, who lived close to the land crossed by the footway, began to make great alterations, and erected some fences and other obstructions upon the way. He also ploughed over a portion of it, and in some parts almost obliterated it. The plaintiff, in spite of the path having thus become less convenient, continued to use it. On Sunday, the 6th of May, 1866, whilst he was approaching the Park Lane end of the path, with a view of passing along it, he met the defendant's agent, who informed him that there was no road that way. The plaintiff replied that there was one, which he had often used before, and intended to use on that day, and after making this observation, passed along the footway. On the 16th of August, 1866, he again, in company with some friends, went to Park Lane, with the intention of traversing the footway. He found it obstructed, and was delayed whilst some persons under his directions, and at his expense, removed the obstructions. On several subsequent occasions he renewed the attempt to use the path, but on each was either obliged to turn back, in consequence of obstructions being placed across it, or else was delayed whilst those obstructions were removed. He suffered no other damage beyond being thus forced, in common with all other persons attempting to use the path, either to retrace his steps and pursue his journey by another road, or else to remove the obstructions. The footway was the shortest and most convenient way from his house to Prestwich. He had been in the habit of using it either for the purpose of taking a walk, or of going to see friends at Prestwich, or otherwise for pleasure or profit.

In order to shew that the way was a public way, acts of user over it were proved, extending over nearly seventy years. But the land it crossed had, during the whole period, been on lease; and it was contended on behalf of the defendant that he, as reversioner,

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was therefore not bound by these acts, and that no dedication by him or his ancestors of the footway to the public could be presumed from them. But the learned judge told the jury that, from long continued user, going back indeed as far as living memory could go, they were at liberty, if they pleased, to infer a dedication of the footway to the public, by Lord Derby's ancestor, at a time antecedent to the land being on lease. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit, on the ground that the plaintiff had not given sufficient evidence of damage to entitle him to maintain the action.

April 17. *Temple, Q.C. (Jones, Q.C., and J. A. Russell, with him), moved accordingly, and in arrest of judgment, on the ground that the declaration did not allege any sufficient cause of action; and also for a new trial, on the ground that the verdict was against the weight of the evidence, and of misdirection on the part of the learned judge in this, that he told the jury they might presume a dedication of the public footway against the defendant, the reversioner, from acts of user in the period during which the land had been on lease. In support of this last point he cited Wood v. Veal (1), where it was held that there could be no dedication of a way to the public by a tenant for ninety-nine years, without the consent of the owner of the fee, and that permission by the tenant would not bind the reversioner after the expiration of the term. In that case there had been user as far back as living memory went. He also cited Baxter v. Taylor. (2).*

The Court (Kelly, C.B., Martin, Bramwell, and Pigott, BB.), without desiring to cast any doubt on the authorities cited, thought that there had been no misdirection, and on that point, therefore, refused the rule. On the remaining points they granted a rule.

June 1, 6. *James, Q.C., Quain, Q.C., and R. G. Williams, shewed cause. The plaintiff suffered an inconvenience peculiar to himself. He resided in the neighbourhood of the path, and his most direct road to a place to which he had frequent occasion to*

(1) 5 B. & A. 454.

(2) 4 B. & Ad. 72.

go, was along it. Then by the obstructions he was delayed, either whilst he had them removed, or by being forced to go a round-about way to his destination. He is thus damaged beyond the rest of the public.

[KELLY, C.B. But he is not damaged more than others of the public who may happen to pass along the way. The result of this argument would seem to be that every individual who attempted to pass along this path could bring an action.]

Every one actually obstructed, and who is driven either to go back or is delayed whilst removing the obstruction could maintain an action; and if it be said this would lead to a multiplicity of actions, the answer is, that the person causing the obstruction would have brought them on himself. An indictment for obstructing a highway is grounded on the *possibility*, and not the fact, of the public being prevented from using it; but any one who suffers, personally, positive inconvenience from the obstruction need not have recourse to an indictment. He can maintain his action for the personal injury he has sustained: Com. Dig. Action for Nuisance (C.) 294; *Meynell v. Saltmarsh* (1); *Hart v. Bassett* (2); *Iveson v. Moore* (3); *Rose v. Miles* (4), explaining *Hubert v. Groves* (5); *Rose v. Groves*. (6)

[CHANNELL, B. The principle laid down in *Iveson v. Moore* (3), and the other cases, is sound. The question is, as to the proper mode of applying it.]

That principle is, that *delay*, however caused, whether in removing the obstruction or going a less convenient way, is a cause of action: *Greasley v. Codling* (7); *Wiggins v. Boddington*. (8) In *Chichester v. Lethbridge* (9), the action was held to be maintainable on either of two grounds. First, because the defendant had offered personal opposition to the nuisance being abated; and secondly, because the plaintiff had been delayed; and Erle, C.J., is in error in stating in *Ricket v. Metropolitan Railway Company* (10) that the decision rested on the first ground only.

[CHANNELL, B. That ground seems the more intelligible. The

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(1) 1 Keb. 847.

(6) 5 M. & G. 613.

(2) Sir T. Jones, 156; 4 Vin.
Abr. 519.

(7) 2 Bing. 263.

(8) 3 C. & P. 544.

(3) 1 Ld. Raym. 486.

(9) Willes, 71.

(4) 4 M. & S. 101.

(10) 5 B. & S. 156; at p. 160;

(5) 1 Esp. 148.

34 L. J. (Q.B.) 257, at p. 259.

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plaintiff in that case was prevented from abating the nuisance, and was thus entitled to bring his action.]

The decision of Willes, C.J., rests distinctly on both grounds.

Temple, Q.C., Jones, Q.C., and J. A. Russell, in support of the rule. All the cases cited are distinguishable. In all of those in which the action has been held maintainable the plaintiff has suffered a greater inconvenience than the rest of the public, who are obstructed in the exercise of their right; see per Erle, C.J., in *Ricket v. Metropolitan Railway Company*. (1) Thus, in *Hart v. Bassett* (2), the plaintiff was prevented from carrying home tithes. But in *Paine v. Partrich* (3), where the plaintiff's damage, as here, was a short delay, it was held that this injury, not being beyond that suffered by the public in general, was not actionable. The rule of law is accurately laid down by Lord Ellenborough, C.J., in *Rose v. Miles* (4), who says that the damage must be "something substantially more injurious" to the individual than to other people. In the present case the plaintiff neither proved nor alleged such substantial injury.

KELLY, C.B. The substantial point for our decision in this case is whether this action is maintainable. The rule of law on the subject, which is well laid down in the case of *Ricket v. Metropolitan Railway Company* (5), is, that in order to entitle a plaintiff to maintain an action, he must shew a particular damage suffered by himself over and above that suffered by all the Queen's subjects. I will refer to one or two authorities in support of this proposition. The leading case is that of *Iveson v. Moore* (6); and it is laid down there by Lord Holt that there must be a particular damage done to a particular person in order to found an action, otherwise there would be danger of a multiplicity of actions. It was observed, indeed, during the argument, that people must be careful not to violate the law, and if they do so, they must take the consequences. Observe, however, to what this argument may lead. It often, for some reason or other, becomes absolutely necessary to set up an

(1) 5 B. & S. at p. 159; 34 L. J. (Q.B.) at 259.

(2) Sir T. Jones, 156; 4 Vin. Abr. 519.

(3) Carth. 191.

(4) 4 M. & S. at p. 102.

(5) 5 B. & S. 156; 34 L. J. (Q.B.) 257.

(6) 1 Ld. Raym. 486.

obstruction in a highway. For example, commissioners of sewers, gas companies, or commissioners for draining, paving, or lighting may be obliged for a time to obstruct a highway. Now, suppose it were to turn out that there was some want of authority for the appointment of the commissioners, or some unintentional deviation from the statutory powers conferred on them, they would of course be liable to an indictment for wrongfully obstructing the highway. But if we were to hold that everybody who merely walked up to the obstruction, or who chose to incur some expenses in removing it, might bring his action on the case for being obstructed, there would really be no limit to the number of actions which might be brought.

Again, let us look further at the general nature of the cases where an action for obstruction has been held to be maintainable. In *Iveson v. Moore* (1), the plaintiff was the possessor of a colliery, and was obliged, in order to obtain the profits of his trade, to take laden carts and waggons, almost every day, along a certain highway. Then, by reason of that highway being obstructed, he personally sustained pecuniary damage. That was clearly special damage to the plaintiff alone. Once more, look at another case—a case which apparently makes most for the plaintiff—I refer to *Hart v. Bassett*. (2) There the plaintiff, a farmer of tithes, was prevented, by the defendant's obstruction, from carrying them home, and the obstruction must have been attended with considerable loss to the plaintiff. He had to take tithe, and he was liable to an action if he allowed the tithe to be injured on the ground, or if it was not taken within a reasonable time. The plaintiff, then, in that case, was obliged, in consequence of the obstruction, to spend extra money in the discharge of his lawful calling. That, therefore, was clearly a case where there was a peculiar pecuniary damage suffered personally by the plaintiff.

With regard to the cases cited for the other side, and to the law as to the cases where an action has been held to be not maintainable, it may, perhaps, be difficult to reconcile them. But it is impossible to look at the case of *Ricket v. Metropolitan Railway Company* (3), and at the observations in the judgments

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(1) 1 Ld. Raym. 486.

(2) Sir T. Jones, 156; 4 Vin. Abr. 519.

(3) 5 B. & S. 156; 34 L. J. (Q.B.) 257.

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of the learned law lords on it (1), without seeing that they thought the law had been too far extended in the direction of allowing this description of action to be brought. In this case, therefore, where there was no pecuniary damage—where the plaintiff merely, on one or more occasions, went up to the obstruction and returned, and on other occasions went and removed the obstruction—that is to say, where he suffered an inconvenience common to all who happened to pass that way—I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained.

Then there is the particular allegation in the declaration as to expense, stating that the plaintiff “was obliged to incur, and did incur on divers days, great expense in and about removing the said obstructions.” That raises the question whether this sort of damage is recoverable. I think not, for if it were, anybody who desires to raise the question of the legality of an obstruction has only to go and remove it, and then bring his action for the expense of removing it. There would then be two modes open to everybody of trying whether the obstruction was lawful, namely, by indictment or by action. But if a person chose the latter way, and removes the obstruction, he only incurs an expense such as any one who might go to remove the obstruction would incur. The damage is in one sense special, but it is, in fact, common to all who might wish, by removing the obstruction, to raise the question of the right of the public to use the way. Upon the authorities, then, and especially relying on *Iveson v. Moore* (2) and *Ricket v. Metropolitan Railway Company* (3), I am of opinion that the true principle is, that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could, would really in effect be to say that any of the Queen’s subjects could. We must therefore make the rule

(1) The judgment of the Court of Exchequer Chamber was affirmed in the House of Lords on the 16th of May last (see Weekly Notes, vol. ii. p. 157); and the judgments of the learned law

lords had been handed to the Lord Chief Baron during the argument.

(2) 1 Ld. Raym. 486.

(3) 5 B. & S. 186; 34 L. J. (Q. B.) 257.

absolute to enter a verdict for the defendant on the plea of not guilty.

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MARTIN, B. I am of the same opinion. I do not think that damage of the sort proved here is sufficient to enable the plaintiff to maintain this action. I have, indeed, some doubt whether we ought not to arrest the judgment. But whatever course we take in point of form, I feel that we ought not to extend the rule which regulates the cases in which this description of action may be maintained.

CHANNELL, B. I am of opinion that the defendant is entitled to have a verdict on the plea of not guilty. The plaintiff cannot maintain this action without shewing that he has suffered damage beyond and in excess of what other people have suffered, and he has, in my judgment, failed to shew any such damage. But I do not think that we should arrest the judgment. The right course is, in my opinion, to enter a verdict for the defendant on the plea of not guilty. My reason for saying so is this:—an application to arrest judgment assumes that all the allegations in the declaration are proved, either because they have not been traversed, or because, if they have been, the issues raised on them have been found in favour of the party against whom the application is made. Therefore, though for convenience the two questions as to arresting judgment or entering a verdict are often argued together, a motion in arrest of judgment assumes that the verdict stands; and I am not prepared to say that, in that event, and assuming the truth of the declaration in toto, we should arrest the judgment. Then, again, I do not think we ought to enter a nonsuit. In point of form, leave was reserved to do so, and to do nothing else. But where a plaintiff has obtained a verdict on a material issue, it would not be just to enter a nonsuit, even though leave so to enter it was in form reserved. I think, however, that we ought to enter the verdict for the defendant on the first issue, just in the same manner as if the reservation had been to do that instead of to enter a nonsuit. The real meaning of reserving leave is to raise a point of law for the consideration of the Court, and they have to deal with the case as they think best in the interests of justice. Whether it is formally

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to enter a verdict or nonsuit, or to do only the one or the other; does not, in my judgment, make any difference in the power of the Court to deal with the case as they think best.

Rule absolute accordingly.

Attorneys for plaintiff: *Field, Roscoe, & Co., for Grundy & Coulson, Manchester.*

Attorneys for defendant: *Appleby, Wright, & Crowther, for S. & S. Woodcock, Bury.*

June 17.

THE BWLCH-Y-PLWM LEAD MINING COMPANY *v.* BAYNES.

Company—Action for Calls—Fraud—Repudiation.

To an action by a company against a shareholder for calls, the defendant pleaded that he was induced to become a shareholder by the fraud of the plaintiffs, that he had never recognised, since notice of the fraud, any rights or liabilities in him, as such shareholder, nor received any benefit from his shares, and that within a reasonable time after notice of the fraud he had repudiated the shares and given notice to the plaintiffs of his repudiation:—

Held, a good plea.

DECLARATION. That the plaintiffs are a company, registered and incorporated under the Joint Stock Companies Acts, 1856-57, and the defendant is a holder of 307 shares in the said company, and is, as such shareholder, indebted to the plaintiffs in 153*l.* 10*s.* for a call of 10*s.* on each of the said shares, which said call was duly made by the said company, under and according to the said acts, upon the defendant, as the holder of the said shares, in respect of moneys unpaid thereon; but the defendant has not paid the same.

Plea, that the defendant was induced to become the holder of the said shares by the fraud of the plaintiffs; and that he, the defendant, never, after he had notice of the said fraud, recognised any rights or liabilities in him, the defendant, as a shareholder, and has never received, and will not receive, any benefit whatever from the said shares; and within a reasonable time after he had notice of the said fraud, and before he had received any benefit

from or in respect of the said shares or any of them, he, the defendant, repudiated and disclaimed the said shares and all title thereto, and all liability in respect thereof, and gave notice of his repudiation and disclaimer thereof to the plaintiffs.

Demurrer and joinder.

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Morgan Lloyd (Coxon with him), in support of the demurrer. The plea is bad, inasmuch as it admits the allegation in the declaration that the defendant is a shareholder. As long as he is so he cannot defend himself against an action for calls by a mere assertion of repudiation: *Henderson v. Royal British Bank*. (1) There should have been either an allegation that he is not on the register, or at least that he has taken all necessary steps to be struck off from it: *Venezuela Railway Company v. Kisch*. (2) If a creditor of the company were the plaintiff, the plea would afford no answer in equity, at all events: *Re Overend, Gurney, & Co.* (3); and the same rule should be applied when the company sues on behalf of the general body of shareholders. It should also have been averred that the defendant was an original allottee: *In re the Liverpool Borough Bank*. (4) If he was not, he cannot be said to have been induced to become a shareholder by the plaintiffs' fraud.

R. E. Turner, contra. The question here is, what the rights of the plaintiffs and defendant are at common law, and the equitable right of creditors against shareholders have nothing to do with the matter. In *Henderson v. Royal British Bank* (1), the only case cited which was decided at law, the plaintiff was a creditor. In *Deposit Life Assurance Company v. Ayseough* (5), the defendant pleaded to an action for calls, a plea of fraud merely, and it was held that a repudiation of the shares ought to have been averred. In this case, accordingly, it has been averred. "Repudiation" is a term implying that the defendant has done all he can to free himself from liability. In *M'Creight v. Stevens* (6), a similar plea was pleaded without objection. With regard to the necessity of alleging the defendant to have been an original

(1) 7 E. & B. 356.

(2) Law Rep. 2 H. L. 99.

(3) Law Rep. 3 Eq. 576.

(4) 26 Beav. 268; 28 L. J. (Ch.) 37.

(5) 6 E. & B. 761.

(6) 1 H. & C. 454; 31 L. J. (Ex.) 455.

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allottee, it is not requisite. The plea shews sufficient to exonerate the defendant from his responsibility as a shareholder.

[BRAMWELL, B., referred to the decision of Willes, J., in *Glamorganshire Iron and Coal Company v. Irvine*. (1)]

Morgan Lloyd, in reply, contended that *Deposit Life Assurance Society v. Ayscough* (2) only decided that a particular allegation which had been omitted was necessary, and did not decide that it was the *only* allegation necessary to make the plea good. The plea was bad without it; but it did not follow that it would have been good with it.

Cur. adv. vult.

June 17. The judgment of the Court (Kelly, C.B., Martin and Bramyell, BB.) was delivered by

BRAMWELL, B. The question in this case, as Mr. Turner in his excellent argument said, arises in a common law action, in a common law court, and is to be decided on common law considerations. The plaintiffs' case is founded on contract. There is no duty on the defendant except what he has undertaken; whether he is an original allottee, or whether he is a transferee who has been accepted by the plaintiffs as a shareholder, the case is the same. If the defendant is liable it is because he has undertaken to fulfil the duties of a shareholder, in consideration of the plaintiffs giving to him the benefits of one. Now, it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and has repudiated it on the discovery of the fraud. This includes giving up all benefit from it, and restoring the other party to the same condition as before, as far as possible. Now the plea alleges all these facts—fraud, prompt repudiation and restitution, as far as possible. It must be good, therefore, at common law, and so we hold. Cases in equity, under the Winding-up Acts, have been referred to. On them we pronounce no opinion, save that they do not govern this case. It may be this defendant is liable under the Winding-up Acts, or that he can otherwise be made, in equity, liable to creditors. No question of that sort arises here. There is no replication, legal or equitable, that the plaintiffs are suing as trus-

(1) 4 F. & F. 947.

(2) 6 E. & B. 761.

tees for creditors or any one else. There may be no creditor, and the action may be brought (we are far from saying it is) merely to indemnify those who have committed the fraud the defendant alleges. But we cannot help observing that creditors trust those who are *liable* as shareholders—those against whom the company is entitled to enforce the duty of shareholders. If the defendant had got on the registry through forgery of his name, he would not be liable, though as much trusted by creditors as now: see per Lord Justice Turner in *Ship's Case*. (1) But with this we have nothing to do. We have to decide a common law question. The authorities at common law are in the defendant's favour, and the ruling of Mr. Justice Willes, at Guildford, in *Glamorganshire Iron and Coal Company v. Irvine* (2), in 1866, is in point. Our judgment is for the defendant.

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Judgment for the defendant.

Attorneys for plaintiffs: *M'Leod & Cann.*

Attorneys for defendant: *Miller & Smith.*

FOULGER v. NEWCOMB.

June 17.

Slander—Words spoken in respect of Business—Special Damage.

Spoken words imputing to a man misconduct in his office or trade are actionable, although the office or trade is not one of which the Court can take judicial notice.

The declaration alleged that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes, that he was employed on the terms of his not doing so, and that a person killing foxes would not be employed as gamekeeper; that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes; special damage:—

Held, on demurrer, a good declaration, even without the allegation of special damage.

DECLARATION. First count: that the plaintiff was a warrener, gamekeeper, horse-slaughterer, and grease manufacturer; that he carried on these businesses in the neighbourhood of Ridler's Wood; and that he was accustomed to be employed in his business of gamekeeper and warrener by occupiers of land in that neighbour-

(1) 2 De G. J. & S. 544.

(2) 4 F. & F. 947.

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hood; that many of the persons who so employed him were accustomed to hunt foxes, and it was considered by them a very improper act to kill or destroy foxes in the neighbourhood; and a person who should be guilty of so killing and destroying foxes would be looked upon by them with disfavour and suspicion, and would not be employed by them; and the plaintiff was always employed as such warrener and gamekeeper upon the terms and understanding that he should not nor would kill foxes in the neighbourhood; that the plaintiff had been employed as such warrener and gamekeeper upon the terms aforesaid by one of the said occupiers, and had by reason of such employment to perform his calling in Ridler's Wood, but not to kill foxes there, and it would have been a gross breach of his duties as such warrener and gamekeeper, and in his said employment, had he killed foxes in the wood, of all which premises the defendant at the time &c. had notice; yet the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such warrener and gamekeeper, and of his conduct whilst he was so employed, the words following: "It is no wonder we did not find any foxes in Ridler's Wood because Foulger trapped three foxes. I can prove it myself;" meaning thereby that the plaintiff, whilst he was so employed as aforesaid, in breach of his duty, killed and destroyed three foxes in the said wood; whereby the plaintiff has been greatly injured in his credit, reputation, and circumstances, and in his said occupations and businesses of a gamekeeper, warrener, horse-slaughterer, and grease manufacturer; alleging special damage from the refusal of divers of the said occupiers of land and others to employ him in the way of his said occupations and businesses.

Second count, repeating the allegations of the first count, except that it omitted the allegation as to plaintiff's employment by one of the occupiers, and the subsequent allegations, and in lieu thereof alleged that the defendant falsely and maliciously spoke and published of the plaintiff, and of him as such warrener and gamekeeper, and of his conduct whilst in those occupations, the words "Foulger trapped three foxes in Ridler's Wood," meaning that the plaintiff, whilst he was employed as such warrener and gamekeeper, wrongfully, unlawfully, and without the authority, leave, or licence of the occupier or person in possession of the

wood, or any other person, broke in, entered, and trespassed in the same, for the purpose of killing, and had killed, foxes there, contrary to the will of his employer and the terms of his employment, whereby the plaintiff has been and is damaged in the manner and to the extent in the first count mentioned.

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Demurrer to both counts, and joinder.

Hance, in support of the demurrers, contended that the words were not actionable per se, since they only imputed to the plaintiff the killing of animals regarded by the law as vermin; and that they did not become actionable because the doing so was a breach of contract; that the special damage was not a natural result of the words, and was therefore too remote, even if the declaration had alleged knowledge in the defendant of the tastes and habits of those to whom the words were spoken, and knowledge by both of the terms of the alleged contract; but that this was so à fortiori when neither of these allegations was made; the alleged charge against the plaintiff of committing trespass gave no strength to the second count. He cited *Ayre v. Craven* (1); *Pembroke v. Colls* (2); *Kelly v. Partington*. (3)

O. Malley, Q C. (*Metcalf* with him), in support of the declaration contended that the words imputed to the plaintiff misconduct in his business, since it was alleged in the declaration that they were spoken of him in respect of his business; that it was not necessary that the business should be one of the duties of which the Court would take judicial notice; that at least the allegation of special damage made the declaration good; and that the statements in the declaration were sufficient to shew circumstances making the words defamatory, and (by charging malice) the defendant's knowledge of those circumstances.

Hance, in reply.

Cur. adv. vult.

June 17. The judgment of the Court (*Kelly, C.B., Martin, Bramwell, and Channell, BB.*), was delivered by

CHANNELL, B. These are demurrers to a declaration for slander containing two counts. The words complained of charge the plain-

(1) 2 Ad. & E. 2.

(2) 10 Q. B. 461.

(3) 5 B. & Ad. 645.

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tiff with trapping foxes. To say simply of a man that he trapped foxes would not, we think, be actionable. There are, however, various circumstances set out in this declaration, which it is asserted shew that there is a good cause of action.

The form of the declaration, and the somewhat peculiar circumstances of the case, gave rise to some little confusion on the argument of the case as to the principle on which an action for defamation is maintainable; and the apparent novelty of some of the points raised induced us to reserve our judgment. One essential ingredient of a good cause of action for defamation is damage. The rules as to the damage necessary to constitute a good cause of action, and as to the cases in which such damage is implied by law, are somewhat arbitrary; but the more important principles of them are now clearly defined. The two rules which we have to consider and apply to the facts of the present case are, first, that from spoken words which impute misconduct in an office, trade, profession, or business, the law implies actionable damage; secondly, that where words are spoken which are of a defamatory nature, yet such that the law will not imply damage from them, still they are actionable if they are shewn actually to cause (as their legal and natural consequence) damage of a character which the law will recognise. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him in respect of his business. This is alleged in the present case, and for the present purpose the allegation must be taken to be true. Next, it must appear that they tend to prejudice him in that business. This, as well as whether the words are capable of having reference to the business, must of course depend upon the nature of the business. Now, we think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades, of the nature and duties of which the Court can take judicial notice. The only limitation of which we are aware is, that it does not apply to illegal callings; as, for instance, to the keeping open rooms for pugilistic encounters, as in *Hunt v. Bell* (1); see also *Morris v. Langdale* (2), a case relating to stock-jobbers, in which the decision proceeded on the ground that stock-jobbers

(1) 1 Bing. 1.

(2) 2 B. & P. 284.

were at that time of two classes, one honest, the other practising what the legislature by the statute then in force called "the infamous practice of stock-jobbing;" and that there was not in the declaration any averment of which business the plaintiff carried on, or whether the contracts he was unable, or said to be unable, to carry out, were legal or illegal contracts. On the same principle, that words having a particular meaning in a particular trade, or a particular locality, may be explained by averment and innuendo in the declaration, we think that the nature and duties of the trade or business may be explained by averment in the declaration, so as to shew how the words spoken affect the business.

In the present case we could not, we think, take judicial notice that it could be the duty of a gamekeeper not to trap foxes, or that it would be a disparaging thing to say of him that he trapped foxes. It is, however, alleged, not only that the plaintiff was a gamekeeper, but that it was his duty as such gamekeeper not to kill foxes; that he was employed on the terms of his not doing so; and that the defendant knew all this.

So far, then, it is clear that, this being the true nature of the plaintiff's business and employment, to hear that he trapped foxes would prejudice him with respect to his business, at all events, with all persons who knew the real nature of his employment. It is not, however, quite clear that, where the nature of the business would not be generally understood, it might not be necessary to shew that the hearers were aware of the facts necessary to give the words their defamatory sense. Here the declaration does not appear to contain a distinct allegation that the hearers knew that the plaintiff's duty was not to kill foxes. It does set forth something as to what the people of the neighbourhood knew and thought, but it does not state that the slander was uttered to people of the neighbourhood. It does, however, contain an innuendo that the words imputed a breach of duty. We think that this may be taken to be equivalent to an allegation that the words would convey that meaning to the hearers, and, taking it with the rest of the declaration, we think it is sufficient to make the declaration good without special damage.

In *Ayre v. Craven* (1), the physician's case, which was the prin-

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principal authority relied on in support of the demurrers, the decision proceeded on the ground that the declaration did not set forth in what manner the misconduct was connected with the plaintiff's profession. Here the declaration does set forth that it was the duty of the plaintiff, in his employment, not to do that which the words complained of charged him with doing. Therefore the objection which was successful there does not arise here. On the whole, therefore, we think that the present declaration shews a good cause of action, independently of special damage.

It is, however, clearly shewn on the declaration that the words are capable of bearing a defamatory sense, viz. the imputing a breach of duty to the plaintiff, and it is alleged that the defendant, knowing the circumstances that made the words defamatory, falsely and maliciously used them in the defamatory sense. That being so, even if the law will not imply damage under the circumstances, still the words are actionable, and the defendant is responsible if they cause, as their legal and natural consequence, actual damage. Here actual pecuniary damage in the plaintiff's business or employment generally is alleged, and we think that this allegation at all events makes the declaration good. Of course if the plaintiff should only prove damage in the horse slaughtering or grease manufacturing departments of his trade, that would not help his case; but, as it is alleged in his business as a whole, we must take it that he means to prove damage in the other branch of his business, in which case it may well be the legal and natural consequence of the words.

There is a second count alleging that the words imputed a trespass as well as a breach of duty; this does not appear to differ substantially from the other.

We therefore hold both counts good.

Judgment for the plaintiff.

Attorneys for plaintiff: *Shirreff & Sons, for J. M. Pollard, Ipswich.*

Attorneys for defendant: *Doyle & Edwards.*

[IN THE EXCHEQUER CHAMBER.]

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June 22.

BUCKLE v. KNOOP AND ANOTHER.

Ship and Shipping—Charterparty—Construction (“delivered”)—Freight, Mode of Calculating—Measurement at port of Shipment or Discharge—Increase of Bulk.

By a charterparty made between the plaintiff and the defendants, it was agreed that the plaintiff's ship should sail to Bombay and there load from the defendants a full cargo of cotton, and proceed with it to Liverpool and deliver the same on being paid freight at the rate of “75s. per ton of 50 cubic feet delivered.” The ship received at Bombay, and carried to Liverpool, a full cargo of cotton; the cargo was packed at Bombay, as is customary, in compressed bales, and expanded greatly on being unloaded at Liverpool:—

Held (affirming the judgment of the Court below), that the freight was payable on the measurement of the goods when shipped, and not when delivered.

APPEAL from the judgment of the Court of Exchequer, discharging a rule obtained by the plaintiff to enter a verdict for him.

The Court held that under a charterparty, providing for payment of freight at “75s. per ton of 50 cubic feet, delivered for cotton or wool,” the freight on cotton in pressed bales was to be calculated on the measurement of the cargo at the port of lading, and not at the port of discharge. [Reported ante, p. 125. (1)]

J. A. Russell (*James*, Q.C., with him), for the plaintiff, urged the arguments that were used in the court below.

Potter (*Mellish*, Q.C., with him), for the defendants, was not called upon.

BOVILL, C.J. In construing this charterparty we must look to the nature and character of the trade, and of the article contracted to be carried. The cargo is to be cotton, which is usually shipped in compressed bales; and it may be doubtful whether the shipowner would under an ordinary charterparty be bound to receive it in any other shape; he might probably say that he was entitled

(1) The plaintiff had also obtained a rule for a new trial, on the ground of misreception of evidence, which was also discharged by the Court below; but from this decision there was no appeal, the Court being unanimous, and no leave being given under 17 & 18 Vict. c. 125, s. 35.

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to have his vessel filled in the usual manner. What, then, is a full cargo of such goods? Both parties are entitled to say that it is a full cargo of compressed bales, according to the capacity of the vessel. But if so, it seems to follow that the freight can be calculated only on that full cargo, so made up and carried. The plaintiff, however, contends that he is entitled to claim an additional freight of 140*l.* 7*s.*, beyond the actual carrying capacity of the ship. But this contention cannot succeed; the rule is correctly laid down in *Gibson v. Sturge* (1), by Alderson, B., that "the freight is to be calculated and paid on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant." There the increase in bulk happened during the voyage; here it happens after the cargo is taken out; but, in substance, the two cases cannot be distinguished, and the same principle applies to both. The only distinction indeed attempted, turned upon the insertion of the word "delivered" in this charterparty, and its absence from the charterparty in *Gibson v. Sturge* (2); but that affords no satisfactory principle of distinction, since the word may well have quite another purpose. Entirely concurring, therefore, in the judgment pronounced by the Court below, and thinking the interpretation they have put upon this charterparty the true one, I am of opinion that their judgment ought to be affirmed.

BLACKBURN, J. I am of the same opinion. The rule was correctly laid down in the case cited from the Court of Exchequer; what is a full cargo must be settled at the time of shipment, and the measurement must be according to the state of facts in which the cargo is then a full and complete one. It was rightly said by the Court of Exchequer in *Gibson v. Sturge* (2), that freight can only be claimed on what is shipped, carried, and delivered. If the parties for any reason choose to deviate from that rule, they may do so, and may make freight payable on the measurement of the cargo when unloaded, or on the cargo as shipped, and whether delivered or not, in which case though a portion is lost, freight is still payable on it. But if any such

(1) 10 Ex. 622, at p. 639; 24 L. J. (Ex.) 121.

(2) 10 Ex. 622; 24 L. J. (Ex.) 121.

variation from usage is intended, the parties should use apt words to express it; in the present case I do not believe it was intended, but it is certainly not expressed.

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MELLOR, SHEE, and MONTAGUE SMITH, JJ., concurred.

Attorneys for plaintiff: *Clarke, Woodcock, & Ryland, for Taddy, Bristol.*

Attorneys for defendants: *Uptons, Johnson, & Upton, for Lowndes & Co., Liverpool.*

JONES v. HOLM.

June 22.

Ship and Shipping—Charterparty—Rescission—Construction—"Full and complete Cargo"—Fire—Different Voyage.

The defendant chartered a vessel to proceed to P., and there load "a full and complete cargo;" the charterparty contained the usual exception of "fire, &c." After part of the cargo was on board, and whilst a portion of the residue was lying alongside, the vessel caught fire; the fire was extinguished by scuttling the vessel, and the damaged cargo on board was necessarily sold by the master, who also forwarded by another vessel the portion then lying alongside. After the ship had been repaired, it was tendered to defendant's agents, but they refused to load any further cargo:—

Held, that the defendant was not exonerated from his obligation to load a full and complete cargo.

SPECIAL CASE stated without pleadings, in an action brought to recover damages for breach of the following charterparty:

On the 29th of January, 1866, a charterparty was made between the plaintiff, the owner of the barque *Edith Marion*, then at Liverpool, and the defendant, by which it was agreed that the vessel should proceed to Pernambuco, and there load from the defendant's factors, "a full and complete cargo of cotton in press-packed bales, with sufficient sugar in bags as ballast," and deliver the same at Liverpool at a certain freight per lb. for the cotton and per ton for the sugar, "restraint of princes and rulers, act of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage always excepted."

The vessel arrived at Pernambuco on the 21st of March, and

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was ready to take her homeward cargo on the 24th of May. On the 1st of June the charterer had loaded 2380 bags of sugar and 700 bales of cotton, and 118 bales were alongside in lighters for loading, when a fire broke out on board, and the vessel was scuttled by the master's orders. The master had at that time signed and delivered to the charterer bills of lading for the whole of the cargo already shipped and alongside, but that cargo did not amount to a full cargo.

The cargo on board was so far damaged that it was necessarily sold by the master by auction, under the advice of surveyors, and it realized 2586*l.*, which the master received.

The master forwarded the 118 bales alongside, by steamer to Liverpool, at a rate of freight higher than the chartered freight, and the cotton was received and the freight paid by the consignees.

The vessel was repaired with all despatch, and was on the 30th of July, and as soon as it could be, tendered to the charterer's agents at Pernambuco to take the remainder of the cargo. They refused to supply more cargo, and the vessel, failing to obtain a cargo at Pernambuco, ultimately obtained at Macao a cargo which she carried to England, at a less freight than she would have earned for a full and complete cargo under the charterparty.

The question for the Court was: whether, upon the facts stated, the defendant was bound to complete the loading of the ship.

June 17. *Mellish, Q.C.* (*Day* with him), for the plaintiff. It lies upon the defendant to shew something which has discharged him from his duty to load a full cargo. The origin of the fire being unknown, it cannot be assumed to be the fault of either party, but must be taken as an accident for which neither was responsible. Moreover, the shipowner is protected by the clause of exception in the charterparty: *Bruce v. Nicolopulo*. (1) But if so, the fire was clearly no reason for rescinding the contract. The case is the same as if the ship had been blown out to sea by a hurricane whilst loading, and had been obliged to repair; the necessary delay would not affect the contract. If, again, after all the cotton had been loaded, half the cargo had been burnt, clearly neither

(1) 11 Ex. 129; 24 L. J. (Ex.) 321.

party would have been excused. Neither would the plaintiff have been excused from carrying the residue, if the defendant had tendered it to him, in the present case. But if the contract subsisted to make one party liable, it must have equally bound the other. He cited *McAndrew v. Chapple*. (1)

Watkin Williams, for the defendant. It must be admitted that mere delay caused by the fire would not have excused the defendant from providing a cargo, but the circumstances under which it occurred do so. The defendant had already loaded a large portion of the cargo, and that, by the events which followed, the plaintiff was unable to carry; it is clear he could not be called upon to load this portion over again, but neither could he under his contract to load a full and complete cargo, be called upon to load the residue, which would be only a fragment of a cargo. Under the circumstances, therefore, the voyage for which the plaintiff required him to load was a different voyage from that stipulated for in the charterparty. But, further, even if this were not so, yet the plaintiff by forwarding a portion of the cargo in a different vessel, elected to treat the charterparty as at an end.

[CHANNELL, B. You must say that, as a matter of law, his doing so shewed a determination of the contract.

MARTIN, B. It is in truth an inference of fact, and I should rather draw the opposite conclusion.]

Mellish, Q.C., in reply.

Cur. adv. vult.

June 22. The Court delivered judgment.

BRAMWELL, B. In this case, which was argued before my Brothers Martin and Channell and myself, I am of opinion that the plaintiff is entitled to our judgment; and my Brother Martin wishes me to state that he agrees with me in that opinion. The first objection made by the defendant was that, in the circumstances under which the delay caused by this accident occurred, the voyage became a different voyage; that the original voyage was frustrated, and the case therefore within the rule which, in the case of such frustration, excuses the charterer from loading. I do not, however, think that the facts stated have this effect. Nothing

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was said to shew that the two months lost made the voyage a different voyage from that agreed for. Neither do I think that the master's forwarding the remaining bales by another vessel shews any intention to treat the charterparty as at an end.

But another objection taken was that the obligation was to ship "a cargo;" that the plaintiff was to carry and deliver "a cargo;" and that that became impossible when the part first loaded was burned; it being admitted the defendant was not bound to load over again a quantity equal to the part burned. But an answer to this objection is found by a mere change of words—viz. by reading the charter as, to load "so many bales of cotton and so many bags of sugar as would make a complete cargo." Read in this way, the charter has not been fulfilled by the defendant in substance nor in words; he shews no justification for not having done so; and the plaintiff is entitled to judgment.

CHANNELL, B., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *H. M. Rowell, for Pain, Newport.*

Attorneys for defendant: *Cotterills.*

June 12.

NIXON AND OTHERS *v.* THE ALBION MARINE INSURANCE
COMPANY.

Special Case—Agreement to waive Stamp Objections—Practice—Striking out Case.

A case was stated for the opinion of the Court in which the question was whether the plaintiffs were entitled to recover from the defendants a sum due on an alleged contract of insurance. It appeared that no stamped policy had been issued, and that the covering note or memorandum of insurance was also unstamped. For the purposes of the case, however, the parties agreed that a valid policy should be deemed to have been executed in the defendants' ordinary form, in accordance with the covering note.

The Court ordered the case to be struck out, on the ground that they could not hear it without sanctioning what amounted to an evasion of the stamp laws.

THIS was a special case, in which the question for the opinion of the Court was, whether, under the circumstances detailed in the case, a certain sum of money could be recovered by the

plaintiffs "upon a contract of insurance alleged by the plaintiffs to have been entered into by the defendants."

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It appeared from the case that no stamped policy of insurance was in existence, but the case stated that it was to be taken that the defendants had executed a valid policy to the plaintiffs in their ordinary form, in accordance with a "covering note," which had been given by the defendants to the plaintiffs. The covering note was also unstamped. By the 35 Geo. 3, c. 63, every general sea-policy, and by the 54 Geo. 3, c. 144, every contract or memorandum of insurance must be printed or written on duly stamped paper; and no unstamped policy, contract, or memorandum of insurance, can be subsequently stamped so as to give it legal validity.

Cohen (Mellish, Q.C., and Nixon, with him), for the plaintiffs, was stopped, whilst reading the case.

[MARTIN, B. We cannot hear this case. None of the documents on which the alleged contract depends are stamped. There is, therefore, no cause of action.]

The parties have agreed that the matter shall be argued as if a stamped policy and note existed. It is competent to them to do so; they thereby attain the same end as where a defendant agrees with a plaintiff not to plead the general issue to an action on an unstamped policy.

[CHANNELL, B. That is quite a different case. Here the Court are asked whether the plaintiffs can recover on an alleged contract. How can we blind ourselves to the fact that the "alleged contract" rests on unstamped documents, and is no contract at all?]

The Court are asked for their opinion on certain admitted facts, which must, for the purposes of the argument, be assumed to be true.

Sir G. Honyman, Q.C. (Quain, Q.C., and Littler with him), contra, was not called on.

KELLY, C.B. If we were to hear this case, we should be assisting the parties to evade the statutes requiring a policy and covering note to be stamped. Whatever course the plaintiffs and defendants might have chosen to take in pleading, we cannot sanction an evasion of the stamp laws, when it comes under our notice. The case must be struck out.

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MARTIN, B. I am of the same opinion, and wish to add that this objection is substantial and not technical. The case in reality asks us to decide upon an imaginary cause of action. If we were to hear it, moreover, we should be neglecting the duty imposed on us to protect the revenue.

CHANNELL, B., concurred.

Case struck out.

Attorneys for plaintiffs: *Field, Roscoe, & Co.*

Attorneys for defendants: *Simpson & Cullingford.*

June 4.

BURTON v. PINKERTON.

Contract of Service—Contract to serve as Seaman—Ordinary Voyage—Illegality—Increased Danger—Foreign Enlistment Act (59 Geo. 3, c. 69), ss. 2, 7—Remoteness of Damage.

The plaintiff agreed with the defendant to serve as one of the crew of a ship, whereof the defendant was master, for twelve months, from London to Rio, or any other of the ports specified in the agreement, amongst which were ports in the Pacific Ocean, and back to a final port of discharge, and to obey during that period all the defendant's lawful commands. He subsequently sailed for Rio with the ship. She was destined, as it appeared from her charterparty, for the service of the Peruvian government, and had on board a cargo of coal and ammunition. In the course of her voyage to Rio she joined company with two Peruvian war steamers, to which from time to time she supplied coal and ammunition. At Rio it became known to the plaintiff and the defendant that hostilities had commenced between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, in the Pacific, another Peruvian port. He was at that time acting under the direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to serve any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement with the defendant. He accordingly left the ship. In an action for breach of contract brought by him against the defendant:—

Held, per Kelly, C.B., Martin and Pigott, BB. (Bramwell, B., doubting), that the defendant must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate.

Per Kelly, C.B.: To serve on board a vessel used as a store ship in aid of a belligerent, the fitting out of which to be so used is an offence within the

59 Geo. 3, c. 69, s. 7, is "a serving on board a vessel for a warlike purpose in aid of a foreign state" within s. 2 of that act.

The plaintiff, after leaving the defendant's ship, was imprisoned at Rio for some days as a Peruvian deserter. When he came out of prison the ship had gone, carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment and the loss of clothes :—

Held, per Martin, Bramwell, and Channell, BB. (Kelly, C.B., dissenting), that these damages were too remote to be recoverable.

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DECLARATION. 1st count, that in the year 1866 the defendant, being master of the ship *Thames*, by an agreement then made between the plaintiff and the defendant in England, contained in a written and printed document signed by the plaintiff and the defendant according to the Merchant Shipping Act, 1854, retained and employed the plaintiff to serve on board the said ship as one of her crew for a voyage, on terms stated as follows :—"Name of ship, *Thames*. Port of registry, London. Master's name, J. Pinkerton. The several persons whose names are hereto subscribed, and whose descriptions are contained below, and of whom twenty-two are engaged as sailors, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, on the voyage from London to Rio de Janeiro, or any port or ports in North and South America, Northern and Southern Pacific and Atlantic Oceans, West Indies, Cape Colonies, Mediterranean, India, China, and Arabian Seas, Australia, New Zealand, backwards and forwards, if required, for a period not to exceed twelve months, and back to a final port of discharge in the United Kingdom or Continent of Europe between the Elbe and Brest. And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the said ship, and the stores and cargo thereof, whether on board, in boats, or on shore, in consideration of which services to be duly performed the said master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed." [The remainder of the agreement is not material.] That the defendant and the plaintiff respectively signed the said agreement, and the capacity in which, and the wages per calendar

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month at which, the plaintiff was retained as aforesaid, were then respectively expressed in the said document against the name and signature of the plaintiff, and all conditions &c. were fulfilled, yet the defendant did not employ the plaintiff to serve on board the said ship according to the said agreement as aforesaid, and the plaintiff was required to serve otherwise than according to the said agreement, and thereby the plaintiff lost the opportunity of earning wages, and was left at Rio de Janeiro, and arrested and imprisoned there, and was deprived of his clothes and tools, and was impeded in obtaining employment.

2nd count, repeating the allegations in the 1st count, and charging as a breach that the defendant did not employ the plaintiff according to the said agreement, and prevented the plaintiff from serving on board the said ship during part of the said voyage, by sailing and departing with her from Rio de Janeiro aforesaid without the plaintiff, and thereby the plaintiff was deprived of his wages, &c. [alleging damage similar to that in the 1st count].

There were several other counts in the declaration, to which, it is unnecessary to refer.

Pleas. To 1st count, non assumpsit, and 2, traverse of the breach in terms. To the 2nd count, 3, non assumpsit; 4, that the defendant was always ready and willing to employ the plaintiff according to the said agreement, but the plaintiff absented himself from the ship, and refused to be so employed; 5, that after the said contract, and before the alleged breach, the plaintiff misconducted himself in remaining absent from the ship for a time longer than that for which he had received leave, and going on shore without leave, and neglecting his duties and failing to perform the same, wherefore the defendant discharged him, which is the alleged breach; and 6, that after the said contract, and before the alleged breach, the plaintiff deserted the ship, wherefore the defendant rescinded the agreement, and discharged the plaintiff. Issues thereon.

The cause was tried before Kelly, C.B., at the sittings in London after Hilary Term last. Upon the evidence then given on the part of the plaintiff and defendant, the substance of which is fully stated in the judgment of the Court, delivered May the 11th (post,

p. 344), the learned judge considered that the contract with the plaintiff was to employ him for twelve months free from any other perils than those which were incidental to an ordinary voyage for commercial purposes, and that war having broken out between Spain and Peru, two states at peace with England, it was a breach of that contract to place the vessel under the orders of the Peruvian government, and to cause her to act in concert with or under the direction of Peruvian war vessels, thus exposing the plaintiff to extraordinary and unforeseen dangers. He accordingly directed the jury to find a verdict for the plaintiff, being of opinion that the defendant had upon the evidence no defence to the action. The jury assessed the damages resulting from the defendant's breach of contract at 12*l.* 10*s.* for loss of wages, 20*l.* for loss of clothes, and 30*l.* for general damage for imprisonment and otherwise. Leave was reserved to move to enter a verdict for the defendant or to reduce the damages by either or both of the sums of 20*l.* and 30*l.*, on the ground that one or both of those sums were given in respect of damages too remote to entitle the plaintiff to recover in respect of them. The plaintiff whilst on shore at Rio had been imprisoned for ten days as a Peruvian deserter. Whilst he was in prison the ship *Thames* had sailed away, carrying some of his clothes on board.

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April 18. *The Solicitor General* (C. Pollock, Q.C., and H. M. Bompas with him) moved accordingly, or for a new trial, on the ground of misdirection. 1st, the defendant committed no breach of contract here. A neutral vessel may carry contraband of war to a port of one of the belligerents: *Ex parte Chavasse*; *In re Grazebrook* (1); *The Helen* (2); *Hobbs v. Henning* (3); *Richardson v. The Marine Insurance Company*. (4) The voyage, therefore, remained legal, although war had actually broken out between Spain and Peru; and there is nothing in the Foreign Enlistment Act (59 Geo. 3, c. 69), s. 7, to make it illegal. The ship was fitted out and started on her expedition before the commencement of war.

[KELLY, C.B. *The Thames* was doing much more than merely

(1) 34 L. J. (Bank.) 17.

(3) 17 C. B. (N.S.) 791; 34 L. J. (C.P.) 117.

(2) Law Rep. 1 Adm. 1.

(4) 6 Mass. Rep. 102.

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carrying contraband of war. She was almost exactly in the same position as one of the Peruvian rams. She was acting in concert with them, and receiving orders from an officer of the Peruvian government.]

But she was in fact a neutral vessel, and sailed under British colours, and although sailing in some respects in company with the rams, did nothing except supply them from time to time with contraband of war, an act no more unlawful than carrying contraband into a belligerent port.

[KELLY, C.B. The voyage became a different voyage at Rio. The captain put himself under the immediate orders of the supercargo. That act, whether legal or not, at all events involved the plaintiff in a risk beyond those risks which he would naturally contemplate as resulting from an ordinary commercial voyage; and that the captain thought so is plain, from the circumstance of his offering the crew an increase of pay if they would continue to serve.]

The increase of danger might justify the plaintiff in refusing to continue to serve, though that is doubtful, but not in bringing an action for wrongful dismissal. The contract might be "off" altogether, but the plaintiff, who voluntarily discharged himself, cannot say that the defendant discharged him; and even if the adventure had become positively illegal, the only result would have been the dissolution of the contract: per Lord Ellenborough, C.J., in *Barker v. Hodgson*. (1) 2ndly, as to the damages, the loss of clothes and the imprisonment of the plaintiff were not the direct and natural consequences of the defendant's act: *The Elizabeth*. (2)

Cur. adv. vult.

May 11. The judgment of Kelly, C.B., Martin and Pigott, BB., was delivered by

KELLY, C.B. A question of great public importance arises upon a motion made in this case by the Solicitor General for a new trial, or to reduce the damages; and we have thought it right to consider the material facts with great attention, not by reason of any doubt entertained, at least on my part, as to the substantial merits of the

(1) 3 M. & S. 267, 270.

(2) 2 Dodson, Adm. Rep. 403.

case, but because it was thought possible that some question ought to have been left to the jury as to the real nature and character of the adventure, and the course actually adopted by the vessel in question as disclosed by the evidence, in relation to the two steam rams belonging to the Peruvian government, and engaged in hostilities against Spain.

The action was brought by the plaintiff, a mariner, to recover damages for the breach of a contract to employ him for twelve months on board the ship *Thames*, upon a voyage to any port or ports in North and South America, Australia, New Zealand, and other places.

The defendant was the master or captain of the ship *Thames*, which proceeded from the port of London on her voyage in the month of February, 1866. The breach of contract alleged is in substance the employment of this vessel for other than commercial purposes, and in a manner exposing the plaintiff to risks and dangers not within the terms of the contract. At the time when the vessel quitted England, war had not actually broken out between Peru and Spain, but on the 25th of February war was declared, and was notified in the *Gazette*, and on the 13th of March the queen's proclamation enjoining strict neutrality was also published in the *Gazette*. It appears upon the evidence alike of the plaintiff and of the defendant, that the ship took in a cargo of coals and provisions, together with 130 casks of ammunition, and two launches, one of them a steam launch, before she left the river. After touching at some places on the English coast, she came into the harbour of Brest, and was then joined by the *Independencia*, one of the two rams belonging to the Peruvian government. She then went to Madeira, where she was joined by the *Independencia* and the other ram, called the *Huasca*, and there put 150 tons of coal on board the *Independencia*. She then left Madeira in company with the two rams, and rockets for signals were put on board the rams. The vessels next reached St. Vincent, signals passing between the rams and the *Thames*. At St. Vincent the second launch was put over the ship's side into the *Independencia*, and two boats belonging to the *Huasca* were taken on board the *Thames*. From thence the *Thames* went to Pedro bay, twelve miles south-west of St. Vincent, the two rams arriving shortly

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after her, and there she put on board one of the rams the 130 cases of ammunition. Thence she proceeded to Rio, where she arrived on the 31st of March, the two rams arriving there the following day. Two days afterwards one of the rams sailed out of Rio, and captured and brought in as prize a Spanish brig, which was afterwards taken out again and burnt, upon which the defendant observed that they might have given him some of the cordage.

This evidence was uncontroverted on the part of the defendant, the master or commander of the *Thames*, who was himself examined as a witness, and who further gave in evidence the charter-party of the ship, from which it appeared that she was chartered for all lawful services and employments for twelve months, that she was intended for the Peruvian government, and that if she should be damaged or burnt by any enemy of Peru, she was to be valued at 45,000*l.*, to be paid by the charterers to the company. He further proved that the *Independencia* had left London three or four days before the *Thames*. He admitted that the plaintiff and other seamen, after their arrival at Rio, insisted that the voyage had been illegal, and desired to go on shore; that he himself, Captain Pinkerton, had told the consul that his destination was Callao, and that he was acting under the orders of Borrás, the supercargo, and agent of the Peruvian government on board, and that it was understood that he was to act in all respects under the direction of the rams belonging to the Peruvian government. He admitted that he knew of the capture of the Spanish brig by the Peruvians, and that it was the talk of the town and generally known. He also admitted that he had told the men that he was going to Callao, and that he would raise their wages if they would go with him, though he denied that he had specified the advance of 1*l.* per month.

I thought upon this evidence that the contract with the plaintiff was to employ him for twelve months on board this vessel, free from any other perils than such as were incidental to a voyage for ordinary commercial purposes, and that war having broken out between Peru and Spain, two states in amity with this country, it was a breach of that contract to place the vessel under the orders of a Peruvian, who was directing and causing her to act in concert with two ships of war belonging to Peru, and engaged in actual

hostilities against Spain, and so exposing the crew to the danger, at any moment, of the loss of their liberty or of their lives.

It is possible that Borrás might have given no orders which would have put the ship in peril; but his orders might have been such as to expose her to an attack from a Spanish ship of war, within an hour after she should have left the port of Rio, when she might have been fired into and sunk or captured, and the crew made prisoners of war. The plaintiff could not foresee what these orders or their consequences might be, but he might fairly infer from the mode in which the ship had been employed in aid of and in concert with the rams, from the time when she had quitted Brest, that she would still be directed to accompany and to supply munitions of war, in fact to be, as she had been, a store ship to these two belligerent vessels. It is enough, in my opinion, that Borrás had power so to employ her. If this evidence raised any question of fact, it should have been left to the jury. But it appeared to me, and I am still of opinion, that the placing of the vessel at the disposal, and under the command of Borrás, was in itself a breach of the contract.

It is unnecessary to determine whether the employment of this vessel in the way thus proved was a violation of the 59 Geo. 3, c. 69. It is certainly against the spirit and intent of that act of parliament which recites that, "the engagement of her Majesty's subjects to serve in war in foreign service without her Majesty's licence (and the fitting out vessels, &c.) may be prejudicial to and tend to endanger the peace and welfare of this kingdom." Then by s. 2 it is expressly enacted that, "if any natural born subject of her Majesty's shall, without such leave and licence, serve in and on board any ship or vessel (used or intended to be used for any warlike purpose) in the service of, or for, or under, or in aid of, any foreign state, &c.;" or, "if any natural born subject shall, without such leave, agree to go, or shall go, to any place beyond seas with intent to serve in any warlike operation whatever in the service of, or under, or in aid of, any foreign state, &c., as an officer, sailor, or mariner, in any such ship or vessel," it shall be deemed a misdemeanor. And by s. 9 offences committed out of the United Kingdom may be tried at Westminster.

By the 7th section it is made an offence to fit out a ship to be

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used in aid of a belligerent, as a store ship, but the offence must be committed within the British dominions. This ship was so fitted out in London, but before the declaration of war, and therefore the offence was incomplete. But it was actually used as a store ship after the declaration of war, and continued to be so used, under the orders of Borrás, after the plaintiff had quitted the ship, and the ship had quitted Rio. If, then, it were necessary to decide the question, I should hold that to serve on board a vessel used as a store ship in aid of a belligerent, the fitting out of which to be so used is an offence within the 7th section, is "a serving on board a vessel for a warlike purpose in aid of a foreign state," within the 2nd section. But if this were doubtful, I am of opinion that so to employ this vessel was a breach of that which I hold to be the contract with the plaintiff, namely, to employ him with the rest of the crew for a specified period on board this vessel upon an ordinary commercial voyage. It is impossible not to see that by adventures like these, this country has been brought to the very verge of war,—first with the United States, and latterly with Spain—and I think that we ought not to permit a doubt to be entertained, whether to engage and employ the crew of a British ship in such an adventure is within the terms of a lawful contract like that which has been entered into between the defendant and the plaintiff. I am, therefore, of opinion that there should be no rule, except to reduce the damages in respect of the loss of clothes and of the imprisonment of the plaintiff; and in this judgment my Brother Martin and my Brother Pigott concur.

BRAMWELL, B. I confess I am not of that opinion, for I think that a rule ought to have been granted. I am not prepared to say that I think the Lord Chief Baron was wrong at the trial, but I am not satisfied he was right. I have sufficient doubt about it to make me think that instead of its being discussed without a rule being granted, it would have been better if it had been discussed after a rule had been granted. The difficulty I feel about it is this: I quite agree that if this vessel was intended to go on what they call a warlike voyage, that is, as a tender to or consort of the rams, the men were entitled to say, "We engaged to go on a voyage of peace, and not to go on a voyage of war, in the course

of which we might be subject to be fired into and be shot." If, however, all she was going to do was to carry contraband of war from port to port, and possibly to run a blockade, I am not so clear that the plaintiff was entitled to say, "That is not a voyage I have undertaken to go, and unless you take me on some other, I am entitled to say you have discharged me." I do not say that even there the plaintiff would not have been entitled to recover, but I should like to have had it discussed. Now as I understand, the direction to the jury was, "Whichever view is correct, the plaintiff is entitled to your verdict," and for that reason I am in doubt, because a jury ought not to be told to find a verdict for the plaintiff unless on any view of the admitted facts he is entitled to it. But I do not differ from any law that was laid down. I merely want to be more advised upon it before I express a decided opinion. I am sure that no man can be more ready than I am to do anything to discourage this sort of business, which, in my opinion, has as little to do with legitimate commerce as smuggling has. For the reasons I have given, however, I should have been glad if a rule had been granted.

Rule refused, except as to the reduction of damages.

May 30. *Edward James, Q.C.*, shewed cause, and contended that damages in respect of imprisonment and loss of clothes could be recovered by the plaintiff.

The *Solicitor General, C. Pollock, Q.C.*, and *H. M. Bompas*, supported the rule.

Cur. adv. vult.

June 4. The following judgments were delivered:—

BRAMWELL, B. We are all of opinion that the plaintiff properly recovered damages for his loss of wages, and that he was also entitled to something under the head of general damage for some of the inconveniences and annoyances he had suffered. One of these, however, was a ten days imprisonment as a Peruvian deserter, and the jury were told that this (amongst other inconveniences) might be considered as damage arising out of the defendant's breach of contract. We may suppose, therefore, that a portion of the 30*l.* was given in respect of the imprisonment which the plain-

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tiff had undergone. But I think—and my Brothers Martin and Channell concur with me in my opinion—that the plaintiff is not entitled to count this imprisonment as an item of damage. It is true that in one sense the defendant's conduct *caused* the imprisonment: but for that, no doubt, the plaintiff would not have been imprisoned. That, however, is not enough. Suppose, for instance, the plaintiff had met robbers whilst ashore, and been injured by them, he certainly could have recovered nothing from the defendant for such injury, yet the defendant might, in that case also, be said to have caused the damage. According to the ordinary rule, damage to be recoverable by a plaintiff must inevitably flow from the tortious act of the defendant. It must be caused by him as the *causa causans*, and this imprisonment was not so caused.

Similar considerations apply to the damage given for the loss of clothes, which my Brothers Martin and Channell, and myself regard as not being the natural consequence of the defendant's breach of contract. As, however, the sum of 30*l.* was given generally, and it is impossible to say how much the jury intended as damages for inconvenience and annoyance generally, and how much for imprisonment, there must be a new trial, unless the parties can agree on some sum to which the damages may be reduced.

MARTIN, B. I am of the same opinion, and I think there must be a new trial, unless the plaintiff will consent to abandon all damage beyond the 12*l.* 10*s.* for loss of wages, or unless the parties can agree upon what proportion of the 30*l.* ought to be given to compensate for the general inconvenience suffered by the plaintiff. In respect of his imprisonment and loss of clothes, he is, in my judgment, entitled to nothing. The defendant was not immediately concerned in causing either the one or the other. Damages for breach of contract must be the direct consequences of the breach; and in this case these two items are too remote from it to be recoverable.

CHANNELL, B. I am of the same opinion; but I do not say that the damages may not properly exceed the 12*l.* 10*s.* given for the plaintiff's loss of wages. They must not, however, in my judgment, include anything in respect of the plaintiff's imprisonment or loss of clothes.

KELLY, C.B. With respect to the general damage, I thought, as by reason of the breach of contract by the defendant in placing the vessel under the orders of the Peruvian ships of war he had left the plaintiff no alternative between serving on board the vessel, and so putting his life and liberty in peril, and landing at Rio, and there remaining till he could find a ship in which he could return to England, that the jury might reasonably give damages in respect of such expenses, inconveniences, and hardships as the plaintiff might have incurred during his compulsory residence there. And as the danger would be greater if he had been obliged to land on a desolate island, without food or clothing, and among savages, than if he had been left in a town where, at a small expense, he could be well provided for, so I thought the jury might consider the difference between his being left in a place of security against all but ordinary risks and inconveniences, and his finding himself at Rio exposed to the consequences of his having belonged to a vessel engaged in the hostilities being carried on between Peru and Spain, and therefore, that if the jury thought the imprisonment of the plaintiff had resulted from the state of things at Rio, thus created by the defendant, they might fairly take it into account in estimating the damages. Then as to the loss of clothes, it was directly caused by their having been left on board when the plaintiff landed to consult the consul, and by the ship having sailed when he came out of prison, and when, if he could have ventured to go on board, he might, no doubt, have had his clothes back again.

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Rule absolute for a new trial.

Attorneys for plaintiff: *Shaen & Roscoe.*

Attorneys for defendant: *Bischoff, Coxe, & Bompas.*

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June 22. *Debtor and Creditor—Deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—Parties to Deed—Construction.*

A deed was made under s. 192 of the Bankruptcy Act, 1861, between “the several persons whose names are subscribed and seals affixed, &c., creditors of S. G. (the debtor), *on behalf of themselves and all and every other the creditors of S. G.* of the first part, and S. G. of the second part.” It contained a covenant by the debtor with all his creditors for payment of a composition on all his debts, and a release by the parties of the first part:—

Held, that the deed was to be read as making all the creditors parties, and that it was therefore valid.

M'Laren v. Baxter (Law Rep. 2 C. P. 559) approved and followed.

To a declaration on money counts, the defendant pleaded to the further maintenance of the action a deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), made between “the several persons whose names are subscribed and seals affixed in the schedule hereunder written, being respectively, either individually or in co-partnership with others, creditors of Solomon Green (the defendant), of Goulston Street, Whitechapel, Middlesex, beerhouse-keeper, on behalf of themselves and all and every other the creditors of the said Solomon Green of the first part, and Solomon Green, of &c., hereinafter called the said debtor, of the second part.”

The deed recited that the debtor “is indebted to the said several persons parties hereto of the first part in the several sums of money set opposite to their respective names in the said schedule hereunder written, and is also indebted to certain other persons in divers sums of money;” that he had agreed to pay a composition of 1s. in the pound “to all and every of the creditors of the said debtor, whether executing this deed or not, at the expiration of one month after the complete registration thereof, which composition the said debtor doth hereby, for himself, &c., covenant, &c., with his said creditors, &c., well and truly to pay or cause to be paid at the time and in manner aforesaid; and to be in full discharge of all and every of the debts of the said debtor now due and owing at the time of the execution of these presents.” It was witnessed that, “in pursuance of the said agreement, and in consideration of the payment by the said debtor to his said several creditors

of such composition as aforesaid, they, the said several persons parties hereto of the first part," released the debtor from all actions, &c., claims, and demands, "which they, the said several persons parties hereto of the first part," had against the debtor. And it was declared that the deed was intended to operate as a deed of composition under the Bankruptcy Act, 1861. Averment of the statutable assents to and registration of the deed, and of the performance of all conditions precedent.

Demurrer and joinder.

June 15. *Henry James*, in support of the demurrer. The case is concluded by authority in this court. In *Gurrin v. Kopera* (1) the parties to the deed were described in the same words as are here used, and the deed was there held bad on the authority of *Chesterfield and Midland Silkstone Colliery Company v. Hawkins*. (2) Now, the deed in the latter case was held bad on the ground that, as the non-assenting creditors were not parties to the deed, they could not sue on the covenant contained in it, and therefore were not on an equal footing with the other creditors. Both these decisions were in conformity with the opinion of Lord Westbury, in *Ex parte Cockburn* (3), that persons not named as parties to a deed cannot sue upon a covenant contained in it, and none of these cases have been overruled. The present case is, in reality, stronger than *Gurrin v. Kopera* (1), since there the covenant could only be implied from the recital, whereas here it is distinctly expressed. An inequality is therefore created which is fatal to the deed.

[KELLY, C.B. *Gurrin v. Kopera* (1) seems to have been decided on the ground that there was no provision in the deed at all, by which the payment of the composition to the creditors was secured, or could be enforced.]

It could not have been held bad on that ground alone, since *Clapham v. Atkinson* (4) had already been decided in the Exchequer Chamber, where a deed was upheld that contained no security for the payment of the composition, nor any means of enforcing it, except the advantage which the debtor would derive from paying

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(1) 3 H. & C. 694; 34 L. J. (Ex.) 128.

(2) 3 H. & C. 677; 34 L. J. (Ex.) 121.

(3) 33 L. J. (Bkr.) 17.

(4) 4 B. & S. 730; 34 L. J. (Q.B.) 49.

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the composition rather than the whole debt. If it is suggested that the scheduled creditors sign as agents for the rest, there is no such allegation in the deed, or in the plea; and were it true, yet the strict rules of law, on which these cases were decided, would not allow them to be parties, so as to have a legal right of action on the deed, since they are not named as parties in it; but their rights would only be in equity, to be enforced at law, if at all, through the medium of those actually parties.

McKellar, in support of the plea. The authority of the cases cited upon the other side has been considerably shaken by *Lay v Mottram* (1), *Gresty v. Gibson* (2), and *Reeves v. Watts* (3), which have given a great flexibility to the construction of words describing parties to deeds of this nature, and have favoured a construction which will make the deed valid by embracing all the creditors. *Brooks v. Jennings* (4) is a direct authority for the defendant, for the parties to the deed were there described in the same words as here, and the deed contained a recital which was held by the Court to amount to a covenant for payment of the composition. The point as to parties was not very distinctly raised there, but it is plainly laid down by Willes, J. (5), that any creditor could have sued on the implied covenant. The point was, however, distinctly adjudicated upon by the Court of Common Pleas, in a case recently decided, of *McLaren v. Baxter* (6), where a deed drawn in the form of the present deed was supported, and the Court held that, if necessary, it might be read as though a stop were placed after the words "on behalf of themselves," so as in terms to make all creditors parties to the deed.

H. James, in reply.

Cur. adv. vult.

June 22. The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Channell, BB.) was delivered by

KELLY, C.B. This was a demurrer to a plea of a composition deed, and although several objections were raised during the argument, there was, in effect, but one question for our decision,

(1) 19 C. B. (N.S.) 479.

(2) Law Rep. 1 Ex. 112.

(3) Law Rep. 1 Q. B. 412.

(4) Law Rep. 1 C. P. 476.

(5) Law Rep. 1 C. P. at p. 481.

(6) Law Rep. 2 C. P. 559.

namely, whether non-assenting creditors were made parties to the deed in such a sense as to enable them to sue on the covenant contained in it. That question turns on the words by which the creditors were made parties. [His Lordship read the words describing the parties.] It was contended that, as there was nothing to shew that these creditors had any authority from the body of the creditors, the deed was only the deed of the executing parties. If that be the true construction, the objection to its validity is of course fatal. A number of authorities were cited to us, especially the case of *Gurrien v. Kopera* (1) in this court, and that of *Brooks v. Jennings* (2) in the Court of Common Pleas. Reference was made also to the case of *Chesterfield and Midland Silkstone Colliery Company v. Hawkins* (3), and to the class of cases beginning with *Ex parte Cockburn* (4), and ending with *Gresty v. Gibson*. (5) It is impossible to reconcile all these authorities with each other. We must, therefore, look at the language of the statute, and the intention of the parties, and form a conclusion on this deed for ourselves. If the real meaning of the parties is reconcileable with the statute, then we shall be able to give effect to the deed.

Now, the words of this instrument, when read for the first time, certainly seem to indicate that certain persons, without any authority, purport to execute the deed for others as well as themselves. But, on careful consideration, we find that the language used is similar to that in the introduction to a bill in chancery, filed by a plaintiff on behalf of himself and a number of other persons, where the words used are construed to include and intend the whole body of persons to whom reference is made. And, on looking narrowly at the terms of this deed, we have only, as is suggested in the recent case of *McLaren v. Baxter* (6), to which I shall refer again presently, to suppose a stop after the word "themselves," and the clause may be read so as to include *all* the creditors of the debtor, both those who execute, and those who do not. This construction, I may add, is one which we ought, if possible, to adopt; first, because the statute no doubt intends that all composition deeds,

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(1) 3 H. & C. 694; 34 L. J. (Ex.) 128.

(2) Law Rep. 1 C. P. 476.

(3) 3 H. & C. 677; 34 L. J. (Ex.) 121.

(4) 33 L. J. (Bkr.) 17.

(5) Law Rep. 1 Ex. 112.

(6) Law Rep. 2 C. P. 559.

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with none but reasonable conditions, shall be effectual; and secondly, because the unquestionable intention of the parties themselves was to bind all the creditors, and to make them all parties, when the requisite majority in number and value had assented. By adopting this construction, then, we give effect both to the intention of the parties and of the statute.

But, independently of these considerations, it appears that in the recent case of *McLaren v. Baxter* (1) the question before us directly arose. The Court of Common Pleas in that case decided that a deed, in precisely similar terms to those used here, ought to be upheld. We are bound by that authority, and our decision accordingly is for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *E. J. Sidney & Son.*

Attorney for defendant: *Joseph Smith.*

June 24.

[IN THE EXCHEQUER CHAMBER.]

TAYLOR *v.* THE CHICHESTER AND MIDHURST RAILWAY
COMPANY.

Corporation created by Statute—Contract—Railway Company—Ultra vires—Power of Directors—Appropriation of Funds of Company by Act—Onus of Proof—Malum prohibitum—Construction.

A railway company being about to apply to parliament for an extension act, an agreement was made under the seal of the company with the plaintiff, a landowner on the course of the intended line, by which, after reciting that the plaintiff had agreed to withhold his intended opposition to the bill on the terms therein mentioned, the company agreed, by clause 3, that they would, within three months after the passing of the bill, pay to the plaintiff 2000*l.*, "as and for a personal compensation to him for the annoyance, inconvenience, disturbance, damage, loss, and injury which he has sustained, or may or will sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the intended railway, and of the parliamentary and other surveys, and other works connected therewith and incidental thereto;" by clause 14, the plaintiff agreed that in consideration of the preceding articles he would not further oppose the passing of the bill during the then present session of parliament.

The bill passed, and three months afterwards the plaintiff brought an action to recover the 2000*l.* mentioned in clause 3 :—

Held, first, that clause 3 was an absolute unconditional covenant to pay the 2000*l.* within three months after the passing of the bill.

(1) Law Rep. 2 C. P. 559.

Secondly (by Keating, Mellor, Montague Smith, and Lush, JJ.), reversing the decision of the Court of Exchequer, that the funds of the company being both by the original and the new act appropriated to specific purposes, which did not include the consideration for the present covenant, the covenant sued on was *ultra vires*, in the sense that the legislature intended that such a contract should not be made, and that the company was therefore not bound by it.

By Willes and Blackburn, JJ., that the contract was not expressly or by necessary implication prohibited, and that the company was therefore bound.

By Blackburn, J., that the case was governed by *Eastern Counties Railway Company v. Hawkes* (5 H. L. C. 331).

By Keating, Mellor, Montague Smith, and Lush, JJ.: that *Eastern Counties Railway Company v. Hawkes* was not inconsistent with their decision; and by Mellor, J., that the present case was governed by *Preston v. Liverpool &c. Railway Company* (5 H. L. C. 605; 25 L. J. (Ch.) 421), and *Macgregor v. Dover and Deal Railway Company* (18 Q. B. 618; 22 L. J. (Q.B.) 69).

By Keating, Mellor, Montague Smith, and Lush, JJ.: When the act by which a company is incorporated limits its objects, and appropriates its funds to defined purposes, a contract made by the company, which discloses on the face of it that, if carried out, it will cause an appropriation of the funds to purposes other than those so authorized, cannot be enforced at law.

By Willes and Blackburn, JJ.: A company incorporated by statute is entitled to make all contracts connected with the purposes of its incorporation not expressly or by necessary implication prohibited; all such contracts are *prima facie* valid; and it lies upon the company seeking to repudiate a contract to shew that it is prohibited, not upon the opposite party to shew that it is authorized.

By Keating, Montague Smith, and Lush, JJ.: The appropriation of the funds of a railway company made by its act of incorporation creates a public trust which a court of law will recognise.

By Willes and Blackburn, JJ.: Such an appropriation only creates, at most, a trust for the shareholders, to be enforced by them in equity; but, *quære*, whether they could have any relief in equity against such a contract as that declared on?

ERROR on the judgment of the Court of Exchequer in favour of the plaintiff, on demurrers to pleas.

Declaration on an agreement between the plaintiff and the defendants, dated the 17th of February, 1865, by which, after reciting that the plaintiff had agreed to withhold his intended opposition to a proposed railway bill of the defendants, upon the terms and conditions thereafter contained, it was agreed that in the event of the bill being passed during the then present session, the defendants would, within three calendar months after the passing of the bill, pay to the plaintiff the sum of 2000*l.*, as and for &c. (setting out the third clause of the agreement, which is stated below in the plea). The declaration then alleged that the bill was passed, and

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that more than three months had elapsed, and averred performance of conditions precedent. Breach, that the defendants had not paid the 2000*l.*, or any part thereof.

First plea, setting out the articles of agreement in full. The agreement, which was expressed to be made between the Chichester and Midhurst Railway Company, incorporated by the Chichester and Midhurst Railway Act, 1864, of the one part, and Sir Charles Taylor of the other part, and was duly executed by both parties, recited that Sir Charles Taylor, the plaintiff, was owner of an estate in Sussex; that the company, the defendants, had given notice of their intention to apply to parliament for an act to enable them to make a railway from their own line so as to form a junction with the London and South Western railway; that as the line of the proposed railway would pass through the plaintiff's property, so as to intersect and seriously damage the same, the plaintiff had accordingly intimated to the company his intention to oppose the bill. That in order to induce the plaintiff to withhold his opposition to the bill, the company agreed to enter into the stipulations and engagements thereafter contained; and that the plaintiff had in consideration thereof agreed not further to oppose the passing of the bill.

It was witnessed, that in pursuance of the agreement, and in consideration of the premises, the plaintiff and the defendants mutually agreed as follows:—

1. That in the event of the bill being passed into an act during the then present session of parliament, the company would make the proposed railway so that it should pass through the plaintiff's estate in the line, or within the limits of deviation, shewn on the annexed plan, or in some modified line that might be mutually agreed on; and would not, without the plaintiff's written consent, make that portion of the railway for which the deviation line was intended as a substitute, in the line shewn on the plans deposited with the clerk of the peace.

2. That in the like event, the company would purchase from the plaintiff, and the plaintiff would sell to the company for 2000*l.*, the part of the estate required for the railway, being about twenty acres.

3. "In the like event, the company will, in addition to the said

sum of 2000*l.*, and within the space of three calendar months after the passing of the bill, pay to the said Sir C. Taylor the further sum of 2000*l.*, as and for a personal compensation to him, the said Sir C. Taylor, for the annoyance, inconvenience, disturbance, damage, loss, and injury, which the said Sir C. Taylor has sustained, or may, or will sustain, in respect of the sporting and preservation of game upon his estate, by or in consequence of the construction of the intended railway, and of the parliamentary and other surveys, and other works connected therewith and incidental thereto."

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4. That the company would in the like event pay the costs of title and conveyance.

5. That the several sums of 2000*l.* should not include any compensation payable for buildings, timber, tenants' compensation, or commonable rights.

6. A provision as to the sum to be paid for any further pieces of the plaintiff's land which the company might require, which was to be at the rate of 100*l.* an acre for inclosed land, and for waste land 25*l.* an acre.

7 and 8. Provisions for the payment of compensation for buildings and timber on the land to be then taken, or to be thereafter taken under clause 6.

9. The company to make and maintain accommodation works as therein mentioned.

10. The company to make a station at a place named, at which all ordinary passenger trains should stop.

11. The company to remove and preserve the surface soil for the benefit of the plaintiff.

12. The company to make compensation for buildings adjacent to the railway and injured by its construction.

13. The company to pay, within one month after the passing of the act, 125*l.* for solicitor's fees, &c.

14. "In consideration of the preceding articles the said Sir Charles Taylor will not further oppose the passing of the said bill during the present session of parliament."

15. That if the plaintiff should desire that the company should ratify the agreement after the passing of the bill, the company should at their own cost execute a formal instrument for that purpose.

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16. A provision for settling by arbitration any differences between the parties, arising upon or out of the agreement.

17. A provision avoiding the agreement if the company should fail to obtain an act in the then session of parliament, authorizing the constructing of the intended railway, or any railway, through any part of the plaintiff's estate.

The plea then alleged that the railway had not, nor had any part thereof, nor had any works been made or constructed; and that the defendants had not required or taken for the purpose of the railway or otherwise any part of the plaintiff's land mentioned in the agreement, or any land, tenement, or estate of the plaintiff; nor had ever given any notice of requiring or taking the said land or estates in the agreement mentioned, or any part thereof, or any lands, or tenements, or estates of the plaintiff; nor had ever agreed with the plaintiff or any person or persons for the purchase or taking of any such lands, tenements, or estates, otherwise than as by the agreement.

Demurrer and joinder.

Second plea, repeating the allegations in the first plea, and alleging that the plaintiff did not sustain annoyance, inconvenience, disturbance, damage, loss, or injury, in respect of the sporting and preservation of game upon his said estate, in consequence of the construction of the railway, or of the parliamentary or other surveys or otherwise, connected therewith or incidental thereto, and that the land, or estate, or plaintiff's interest in the same, never was injuriously affected by the execution of any works of the said railway or company.

Demurrer and joinder.

The Court below gave judgment for the plaintiff, and the defendants brought error.

Feb. 7. *Mellish, Q.C.* (*Hannen* with him), for the defendants. The covenant sued on is an absolute and independent covenant to pay 2000*l.* within three months after the passing of the bill. Admitting, for the sake of argument, that the agreement is valid and binding on the company so far as it relates to the purchase of the land, and that the breach of it would form a good ground of action; and admitting also, that, as decided in *Simpson v. Lord*

Howden (1), a contract to buy off opposition in parliament is not illegal, yet this contract, whether considered as made by the directors affecting, as promoters of the bill, to bind the funds to be raised under it, or as administering the funds of the company under the old act, was ultra vires. The power of promoters to bind a company by their contracts at all has been much questioned in the case of *Preston v. Liverpool &c. Railway Company* (2), and that case is at least an authority that such contracts, to be binding on the company, must be contracts which the company could itself have lawfully entered into after its formation; it is also an authority that to enter into a covenant with a person to pay him a sum of money for not opposing them in parliament, would be ultra vires in the company. It is true the decision did not necessarily involve either proposition, but they were both so far relevant that they determined the construction of the contract then in question; and in order not to give it an illegal character, that, which the plaintiff contended to be an absolute contract, to take effect whether the railway was or was not made, was construed by the House of Lords to be dependent on the making of the railway and the taking of the plaintiff's land; as had been done before in a similar case by the Queen's Bench in *Gage v. Newmarket Railway Company*. (3) In *Earl of Shrewsbury v. North Staffordshire Railway Company* (4), Kindersley, V.C., not being able to put any construction on the contract which would not make it otherwise than ultra vires, held it to be void, laying down that the application of the funds of the company to the purchase of such countenance and support as were there bargained for could not be authorized even by a majority of shareholders at a general meeting, as against a single dissentient shareholder. A similar decision was arrived at by the Court of Common Pleas, in *East Anglian Railway Company v. Eastern Counties Railway Company* (5), on a contract by the defendants to take a lease of the plaintiffs' line, and it proceeded on the ground that a corporation established by act of parliament could only apply its funds to the purposes authorized by the act.

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(1) 9 Cl. & F. 61.

(2) 5 H. L. C. 605; see p. 621;
25 L. J. (Ch.) 421.

(3) 18 Q. B. 457; 21 L. J. (Q.B.) 398.

(4) Law Rep. 1 Eq. 593, 618.

(5) 11 C. B. 775, 811; 21 L. J.
(C.P.) 23, 26.

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[BLACKBURN, J. The opinion of Parke, B., in *South Yorkshire Railway Company v. Great Northern Railway Company* (1), is at variance with the opinion of Jervis, C.J., in *East Anglian Railway Company v. Eastern Counties Railway Company* (2), and assumes that corporations so created have power to do all acts which they are not expressly or by clear implication prohibited from doing; and this opinion is supported by Erle, J., in *Mayor of Norwich v. Norfolk Railway Company* (3) and *Bostock v. North Staffordshire Railway Company*. (4) The question is, whether a breach of the statutory directions as to the destination of the funds is merely a breach of trust to be restrained by a shareholder, or altogether an illegal act.]

The case of *East Anglian Railway Company v. Eastern Counties Railway Company* (2) was followed by the Exchequer Chamber in *Macgregor v. Dover and Deal Railway Company* (5), and expressly assented to by Lord Cranworth, C., in the House of Lords in *Eastern Counties Railway Company v. Hawkes*. (6) A breach of a trust contained in an act of parliament is an illegal act, and a covenant to commit a breach of a trust so created is illegal. But by s. 7 of the company's old act (27 & 28 Vict. c. lxxv), and by s. 11 of their new act (28 & 29 Vict. c. cccliv), the funds to be raised under each act by shares or mortgage are to be applied only to the purposes authorized by the acts respectively. If, then, the covenant were only for the payment of costs incurred by the directors in soliciting the new act, it would, so far as regards the funds raised under the first act, be clearly illegal on the authority of the cases cited; and, so far as regards the funds raised under the second act, would only be valid under the usual clause directing costs to be paid (s. 27). It would still more certainly be illegal under both acts, if it were a direct covenant to pay a sum of money to the plaintiff for withdrawing his opposition. But the contract is, in truth, nothing else, as is shewn by the fact that the money is to be paid whether any land is taken or not; it cannot, therefore, be any part of the com-

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| (1) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 13. | (Q.B.) at p. 110. |
| (2) 11 C. B. at p. 811; 21 L. J. (C.P.) at p. 27. | (4) 4 E. & B. at p. 813; 24 L. J. (Q.B.) at p. 231. |
| (3) 4 E. & B. at p. 416; 24 L. J. | (5) 18 Q. B. 618; 22 L. J. (Q.B.) 69. |
| | (6) 5 H. L. C. at pp. 347-8. |

pensation for the land. It is true some other trifling inconveniences are stated, which are obviously on the face of the agreement not the real consideration, but these, if not connected with the land, were not subjects of compensation under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 16), and will not assist the validity of the contract. If it is objected, that to hold this contract void would deprive promoters and directors of the power to compromise with opponents, the answer is, that if they do so, they should put clauses in their bill confirming and validating such contracts, and the shareholders would then have fair notice of the claims to which the company is to be subject.

Manisty, Q.C. (*Sir G. Honyman, Q.C.*, and *H. Lloyd*, with him), for the plaintiff. The case is untouched by the authorities cited for the defendants. It is, in the first place, free from the difficulty of the promoters, who made the contract, being different persons from the company who are to be bound by it; for this is the case of the old company merely seeking powers to make a new line. Further, the agreement must be taken to have been *bonâ fide* entered into for the considerations and under the circumstances stated in it. Even if the consideration given by the plaintiff were confined to withholding opposition, there is nothing to shew, and the contrary may be assumed, that the company did not save many thousand pounds in parliamentary expenses. Such an advantage, obtained by the company through the plaintiff's desistance from his legal right of opposing them in parliament, is a perfectly good consideration; and it might even be contended that a liability so incurred would be within the section of the new act (s. 27), directing the costs of passing the bill to be paid out of the money to be raised under the act. But it is stated to include, and evidently does include, other considerations, such as the detriment, both present and future, suffered by the plaintiff through the defendants' surveys, &c., and the increased difficulty in the preservation of game. The contract, then, is one which would have been perfectly valid if made after the passing of the bill, and it is one, therefore, which the defendants, as promoters, were capable of making.

[MELLOR, J. Suppose a line were projected, and a contract of

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this sort were entered into with a secret agreement to apply next session to parliament for a deviation?]

Such an agreement might be a fraud on parliament, but nothing of the kind is alleged. This is in fact only making an agreement beforehand which the company might certainly have made afterwards and upon a matter on which they must ultimately have come to some agreement. Requiring the plaintiff's land, the company wished to settle the terms at the outset. This distinguishes the case from *Earl of Shrewsbury v. North Staffordshire Railway Company* (1), where the consideration was confined entirely to personal annoyance; here, on the contrary, a substantial consideration is shewn, and if that exist the Court will not inquire into its adequacy, or into the value of other considerations that may be joined with it. The cases of *Gage v. Newmarket Railway Company* (2) and *Preston v. Liverpool &c. Railway Company* (3) were both cases of mere construction, as appears clearly from the remarks of Lord Cranworth in the latter case (4); and the House of Lords there expressly abstained from laying down any general principle as to contracts of the directors which were ultra vires; and in *Eastern Counties Railway Company v. Hawkes* (5), they came to a decision which directly supports the plaintiff's contention. The true principle, it is contended, is that which was laid down by Lord Wensleydale in *South Yorkshire Railway Company v. Great Northern Railway Company* (6), and by Erle, J., in *Mayor of Norwich v. Norfolk Railway Company* (7) and *Bostock v. North Staffordshire Railway Company*. (8) With respect to the appropriation of the funds of the company by the two acts, this has reference only to the money raised by shares and mortgages, but there is nothing to prevent the sum agreed on from being paid out of other sources of income. If necessary, however, the defendants can, by section 27 of the second act (28 & 29 Vict. c. cccliv), pay it out of the new capital to be raised under that act.

(1) Law Rep. 1 Eq. 593.

(2) 18 Q. B. 457; 21 L. J. (Q. B.) 398.

(3) 5 H. L. C. 605; 25 L. J. (Ch.) 421.

(4) 5 H. L. C. at pp. 620-2.

(5) 5 H. L. C. 331.

(6) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 313.

(7) 4 E. & B. at p. 416; 24 L. J. (Q. B.) at p. 110.

(8) 4 E. & B. at p. 813; 24 L. J. (Q. B.) at p. 231.

[WILLES, J. The payment is expressed to be partly in consideration of trespasses committed on the plaintiff's land, and it does not appear that the consideration for these trespasses may not have amounted to 2000*l*.]

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Mellish, Q.C., in reply. The company can be answerable for no trespasses but such as were committed by their officers or agents in pursuance of the powers given to them. But as it was not within the power or duty of the directors to survey for a new line on behalf of the old company, the defendants cannot be answerable for trespasses so committed. Neither is such a payment within the final clause of the new act. The plaintiff's remedy, therefore, is only against the individual trespassers; and their acts can form no consideration as against the company. As to the suggestion that the money might be paid otherwise than out of the share capital of the company, the intention is obviously to make it payable out of this fund, and further, 8 Vict. c. 16, ss. 120-3, appropriates all profits to dividends, subject to a power to set apart a sum for working expenses.

[LUSH, J. If the judgment stands, the plaintiff may issue execution against the assets of the company, and if there are none, against the shareholders to the extent of their unpaid shares.]

Preston v. Liverpool &c. Railway Company (1) is as strong in favour of the defendants as anything can be, short of a direct decision upon the point, for if the agreement there had been construed to be, as this one clearly is, an agreement to pay the money in any event, whether the land was or was not needed or taken, it is plain that the House of Lords would have decided that it was ultra vires. As to the distinction between a right enforceable at law and in equity, the distinction between the two systems is one that at least ought not to be allowed to prevail where the trust broken is one created by a public act of parliament for public purposes. If it were otherwise the question of ultra vires is one which could never arise in a court of law.

[BLACKBURN, J. It could not, unless the act in question were so prohibited as to make it illegal.]

The case of *East Anglian Railway Company v. Eastern Counties Railway Company* (2) must be overturned if the plaintiff's con-

(1) 5 H. L. C. 605; 25 L. J. (Ch.) 421. (2) 11 C. B. 775; 21 L. J. (C.P.) 23.

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tention is to succeed; but it has the assent of Parke, B., in *South Yorkshire Railway Company v. Great Northern Railway Company* (1), in the very judgment relied upon on the other side, in which he cites that case without disapproval, and it is also supported by what is said by Lord Campbell in *Mayor of Norwich v. Norfolk Railway Company*. (2) As to section 27 of 28 & 29 Vict. c. ccliv, it cannot be extended so far as to cover a covenant of this nature.

Cur. adv. vult.

June 24. The following judgments were delivered:—

MONTAGUE SMITH, J. My Brothers Keating and Lush concur in the judgment I am about to deliver.

The covenant sued upon is contained in an agreement between the plaintiff and the defendants, the Chichester and Midhurst Railway Company, incorporated by an act of parliament, in 1864, for making a railway from Chichester to Midhurst. [The learned judge stated the agreement (reading the recitals and the second and third articles), and the effect of the pleadings.]

It will be observed that the second article of the agreement, relating to the purchase of the land, contains no provision as to time, and does not ascertain the specific land which would be required for the construction of the railway. It is not necessary for the Court to decide whether this covenant is an absolute covenant to purchase the land, or conditional upon the company requiring the plaintiff's land for their railway; and, if absolute, whether it would be ultra vires of the company, so as to fall within the dilemma pointed out in the decision in *Gage v. Newmarket Railway Company* (3), and in *Preston v. Liverpool &c. Railway Company*. (4) The covenant now in question is in terms an absolute covenant to pay 2000*l.* within three months after the passing of the act, as a personal compensation to the plaintiff for the assumed inconvenience and injury described in it.

It is contended, on the part of the plaintiff, that as this sum of

(1) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 313.

(2) 4 E. & B. at p. 444; 24 L. J. (Q.B.) at p. 105.

(3) 18 Q. B. 457; 21 L. J. (Q.B.) 398.

(4) 5 H. L. C. 605; 25 L. J. (Ch.) 421.

2000*l.* is thus made payable to the plaintiff absolutely and in all events, whether the company make their railway or not, whether they take the plaintiff's land or not, and notwithstanding that the damage and inconvenience, which are substantially prospective, may never be done or suffered, the covenant provides for a misappropriation of the funds of the company, and that it is, therefore, *ultra vires*, and the action upon it cannot be maintained.

It appears to us that this contention is well founded, and ought to prevail. The agreement being made conditional on the passing of the new act, it is necessary to consider the position of the company under both their acts; but, granted that it follows from the decision of the House of Lords in *Eastern Counties Railway Company v. Hawkes* (1) that there may be agreements which, being *ultra vires* of the company under their old act, might be sanctioned and so brought *intra vires* by the new act, we think this agreement cannot be deemed to be so sanctioned, and that it is *ultra vires* of the company under both their acts.

The 7th section of their first act (27 & 28 Vict. c. lxxv) enacts, that the moneys authorized to be raised by shares or mortgage shall be applied to the purposes only "by this act authorized." And by the 11th section of the second act (28 & 29 Vict. c. ccliv) it is enacted that "all and every part of the moneys which the company are by this act authorized to raise by new shares or mortgage shall be applied only to the purposes authorized by this act." Now if, from inability to raise money or other causes, the new railway shall never be commenced, this money would still be payable to the plaintiff under the covenant, without any equivalent whatever: for there would be no land or other thing to represent the money. Moreover, if no money could be raised under the powers of the new act, it would have to be paid out of the funds of the company arising under their original act. The funds of the company would thus come to be appropriated to purposes other than those to which, under either of the acts, they could only be applied; and so, to purposes in effect prohibited.

It appears that the covenant to pay this money was entered into as an inducement to the plaintiff not to oppose the bill in parliament; but if the plaintiff's agreement to withhold opposition is

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relied on as sufficient consideration, there is strong authority in the recent decisions to overthrow the opinion that an agreement to pay a sum for buying off an opposition to a bill is within the scope of the powers of an existing railway, or can be fastened upon it after the new act has been obtained: see *Preston v. Liverpool &c. Railway Company* (1), and see the decisions collected and commented on by V.C. Kindersley in *Earl of Shrewsbury v. North Staffordshire Railway Company*. (2)

There seems to us to be direct authority that this covenant to pay money out of the funds of the company absolutely, whether the line is made or not, and the damage is done or not, is ultra vires. In the case of *Gage v. Newmarket Railway Company* (3), Lord Campbell, in giving the judgment of the Court, delivers a distinct opinion, that if the deed in that case could have such a construction it would be ultra vires and void; and the Lord Chancellor (Lord Cranworth) in his judgment in *Preston v. Liverpool &c. Railway Company* (4), in the House of Lords, gives a strong opinion to the same effect. No doubt these opinions are in some sense dicta, but they are dicta of great weight and high authority; for in both these cases the judgments put the plaintiff in the dilemma, either that the covenants to pay the money were conditional on the company acquiring the lands, or, if they were to be construed as absolute covenants for payment, whether the land was acquired or not, then they were ultra vires; and the judgments on the latter point only became dicta because the plaintiff failed by being fixed on the first horn of the dilemma. The case of *Eastern Counties Railway Company v. Hawkes* (5) has been relied on in favour of the plaintiff; but it appears to us to be clearly distinguishable from the present. In that case the Eastern Counties Railway Company, who were promoting a bill for a new line, agreed with Mr. Hawkes to purchase his property for 8000*l.*, and to pay him a further sum of 5000*l.* for compulsory eviction. In fact, it was an agreement to give him 13,000*l.* for his property, such price including, as is usual, a sum for compulsory purchase.

(1) 5 H. L. C. 605; 25 L. J. (Ch.) 421.

(2) Law Rep. 1 Eq. 593.

(3) 18 Q. B. 457; 21 L.J. (Q.B.) 398.

(4) 5 H. L. C. at p. 622.

(5) 5 H. L. C. 331.

The noble and learned lords appear to have considered that this was the ordinary case of a contract made by a railway company, for the purchase of lands required by the company for their authorized railway; and they decided that, although made by the company before they obtained their new act, it was to be regarded when that act was passed as authorized and sanctioned.

But in that case the learned lords expressly guarded themselves from being understood to infringe on the principle of former decisions. The Lord Chancellor, in giving judgment, refers with approbation to the important case of *East Anglian Railway Company v. Eastern Counties Railway Company* (1), and to the judgment of Jervis, C.J., in that case. One objection made to the contract with Mr. Hawkes was, that the company had contracted for more land than they required for the railway, and that the contract was so far ultra vires; this objection was, however, answered by the consideration that the property might be really so injured as a whole that the company would be bound to take the whole, or might really want the whole; and that, at all events, it did not appear on the face of the agreement that this might not be so. The broad distinctions between that case and the present, therefore, are, that *there* the contract was for the purchase of land required for the railway, and there was an equivalent for the price paid, whereas *here* the money is contracted to be paid for damage which may never be done, and in respect of which money there may be no value or equivalent whatever. It appears to us to be clear, from the subsequent case of *Preston v. Liverpool &c. Railway Company* (2) (already adverted to), that the House of Lords understood their own decision in *Eastern Counties Railway Company v. Hawkes* (3) in the sense in which I have endeavoured to interpret it.

But it was, secondly, contended on the part of the plaintiff, that although this covenant may be ultra vires of the company, it is only so in the sense that individual dissentient shareholders might obtain relief in a court of equity, and that the agreement being under seal, the company, as a company, are bound by their covenant in a court of law. It seems to us that this distinction is

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(1) 11 C. B. 775; 21 L. J. (C.P.) 23.
(2) 5 H. L. C. 605; 25 L. J. (Ch.) 421.
(3) 5 H. L. C. 331.

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not sound. We think that if a contract made by a company incorporated by act of parliament for defined and limited objects, discloses on the face of it a covenant which, if enforced, would cause the funds of the company to be appropriated to purposes other than those to which the act says they shall "only" be applied, such an agreement cannot be made the foundation of an action. In the case of railway companies it is necessary, not only for the interest of shareholders, but of the public, that this should be so. The public are undoubtedly interested in the maintenance of a railway authorized by parliament. Landowners and other persons have probably sustained much individual loss and inconvenience for that which is assumed to be a public good; and all the queen's subjects have an interest that the funds of the company should not be improperly diverted from the purposes to which parliament has declared they shall be applied. This view of the law was presented in explicit terms by Jervis, C.J., in *East Anglian Railway Company v. Eastern Counties Railway Company* (1), already referred to. It would be of little use for the legislature to define the limits of action of companies and the application of their funds, if a different rule were to prevail; and it seems reasonable to hold, that when parliament does define the objects of a company and the appropriation of its funds, it by implication prohibits other objects and a different appropriation. The principle cannot be more clearly stated than in the language of Parke, B., in *South Yorkshire Railway Company v. Great Northern Railway Company* (2), "But where a corporation is created by an act of parliament for particular purposes, with special powers, then indeed another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was ultra vires—that is, that the legislature meant that such a deed should not be made."

The principle so laid down was adopted and acted upon by Lord Campbell, C.J., in his judgment in *Mayor of Norwich v. Norfolk*

(1) 11 C. B. at p. 811; 21 L. J. (C.P.) at p. 26.

(2) 9 Ex. at p. 84; 22 L. J. (Ex.) at p. 314.

Railway Company. (1) Indeed, Lord Campbell had before declared in *Gage v. Newmarket Railway Company* (2), that, in his opinion, a deed ultra vires would be void at law. The doctrine was also very distinctly stated by Jervis, C.J., in delivering the judgment of the Court in the case of the *East Anglian Railway Company v. Eastern Counties Railway Company* (3), already referred to, where it was held that a contract by the Eastern Counties Railway Company to pay the costs of promoting a bill in parliament to obtain the lease of another railway company was void, and that no action could be maintained on it.

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In *Eastern Counties Railway Company v. Hawkes* (4), Lord Cranworth, C., after referring to certain cases in equity, says: "In all these cases the discussion was raised by shareholders calling in question the misapplication, or intended misapplication, of the corporate funds by the directors. But the doctrine has been acted on in the courts of common law, to the extent of holding that a contract, even under the seal of the company, cannot in general be enforced, if its object is to cause the corporate property to be diverted to purposes not within the scope of the act of incorporation;" and Lord Cranworth, after referring in support of this proposition to the judgment of Jervis, C.J., in *East Anglian Railway Company v. Eastern Counties Railway Company* (3), and to other cases, speaks of it as "well-settled doctrine."

If, then, in the present case, the first branch of the contention on the part of the defendants is established, as we think it is, viz. that the covenant sued upon is a contract for the appropriation of the funds of the company to a purpose not authorized, and by implication prohibited by the acts of incorporation, and so ultra vires, there would certainly appear to be very strong authority to support the second part of the defendants' contention, viz. that such a contract cannot be made the foundation of an action.

For these reasons we are of opinion that the judgment of the Court of Exchequer ought to be reversed.

(1) 4 E. & B. at p. 446; 24 L. J. (Q.B.) at p. 125.

(2) 18 Q. B. at p. 469; 21 L. J. (Q.B.) at p. 403.

(3) 11 C. B. at p. 811; 21 L. J. (C.P.) at p. 26.

(4) 5 H. L. C. at p. 347.

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Montague Smith, J., read the judgment of

MELLOR, J. I am of opinion that the judgment of the Court below ought to be reversed. I have had the opportunity of reading the judgment of my Brother Blackburn, as well as that of my Brother Montague Smith, and, inasmuch as the facts of the case are fully set out in those judgments, it is not necessary that I should repeat them.

I think that we are concluded by the judgment of the Court of Common Pleas in *East Anglian Railway Company v. Eastern Counties Railway Company* (1) which was expressly affirmed by the Court of Exchequer Chamber in *Macgregor v. Dover and Deal Railway Company* (2), in which case Alderson, B., in delivering the judgment of the Court, said: "The question is, we think, determined by the decision of the Court of Common Pleas in *East Anglian Railway Company v. Eastern Counties Railway Company*. (1) It is there laid down, that a railway company incorporated by act of parliament, is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever." And it was accordingly held that the parties to the agreement in that case must be taken, with full knowledge of the powers conferred on the South Eastern Railway Company, to have made a contract by which the defendant was to bind the company to do an illegal act; not merely an act which they had no power to do, but an act contrary to public policy, and the provisions of a public act of parliament. And it was accordingly held to be a void contract, and one which could not form "the proper ground for a suit in a court of law."

It was contended in the argument before us, that the decision in that case must be considered as qualified by the superior authority of the *Eastern Counties Railway Company v. Hawkes*. (3) I confess that I am unable so to understand the latter case. It is clear that the Lord Chancellor did not consider that the conclusion at which the House of Lords arrived was at all at variance with the *East Anglian Railway Company v. Eastern Counties Rail-*

(1) 11 C. B. 775; 21 L. J. (C.P.) 23.

(2) 18 Q. B. 618, 631; 22 L. J. (Q.B.) 69, 70.

(3) 5 H. L. C. 331, 348.

way Company (1), and the case of *Macgregor v. Dover and Deal Railway Company* (2), for he cited them with approbation, and in the course of his judgment said: "It must now, therefore, be considered as well settled doctrine, that a company, incorporated by act of parliament for a special purpose, cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be." There is nothing in the judgments delivered by the other noble and learned lords which shews that they intended to qualify or overrule the doctrine established by those cases; and the judgment of the House of Lords appears to have proceeded upon the ground that the company having made a bargain with the respondent for the sale of lands to them, arranged as part of the terms that they should not only purchase lands which they expected to require for the construction of the line of railway they were promoting, but also that they should purchase the respondent's house and grounds at a given sum, in order to avoid any claim for damages to such residence and grounds which might arise from the construction of the railway. It was therefore treated as one of those ordinary bargains made with landowners for the purchase of lands at an agreed price; and the decree for a specific performance was accordingly made, notwithstanding the company did not actually require the property in question, in consequence of the legislature having declined to authorize the construction of the line of railway in the exact course contemplated by the promoters at the time the agreement was made.

Whether all that was said in that case can be reconciled with the cases above referred to may be questionable; but I am quite satisfied that it was not intended to affect them as authorities. I think that the facts of the present case bring it within the authority of the later case of *Preston v. Liverpool &c. Railway Company* (3), in which Lord Cranworth, C., after referring to a dictum of Lord Campbell to the same effect, is reported to have said, that "he should have had no possible doubt that it was ultra vires of a corporation established for making a railway, to enter into a covenant to pay 5000*l.* for not opposing them in

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(1) 11 C.B. 775; 21 L.J. (C.P.) 23. (2) 18 Q.B. 618; 22 L.J. (Q.B.) 69.

(3) 5 H. L. C. 605, 622.

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parliament. To do so was beyond the powers to be conferred, or that ever were conferred upon the directors of a railway company.” It is true that the bargain there was with the promoters, and not with the company, but the reasoning of Lord Cranworth clearly brings it within the rule which ought to govern the present case; for he said, in substance, that no contract of the promoters would bind the company, which the company, when formed, would not have entered into. The observations of Vice Chancellor Kindersley in *Earl of Shrewsbury v. North Staffordshire Railway Company* (1) also seem to me strongly to support the contention of the learned counsel for the defendants, that the covenant under consideration is either void, as being ultra vires, or illegal, as being impliedly prohibited by the clauses of both acts of parliament, which appropriate the money authorized to be raised to the purposes only of the acts. There is nothing in the view which I take of this case which is inconsistent with the judgment of Parke, B., in *South Yorkshire Railway Company v. Great Northern Railway Company* (2), in which, distinguishing between the contracts of ordinary corporations and those of corporations created by acts of parliament for particular purposes with special powers, he said of the latter that “their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating them, or by necessary or reasonable inference from its enactments, that the deed was ultra vires, that is, that the legislature meant that such a deed should not be made. The cases cited on the argument of *East Anglian Railway Company v. Eastern Counties Railway Company* (3), *Macgregor v. Dover and Deal Railway Company* (4), and *Bagshaw v. Eastern Union Railway Company* (5), are of this description;” and he adds that Lord St. Leonards, though strongly expressing his dissatisfaction with such defences, “intimates his opinion, given with some reluctance, that these cases are rightly decided, and that they are cases in which it appears that the company did enter into engagements clearly beyond their powers

(1) Law Rep. 1 Eq. at p. 608.

(4) 18 Q. B. 618; 22 L. J. (Q.B.)

(2) 9 Ex. at p. 84; 22 L. J. (Ex.) 69.

at p. 313.

(5) 2 Mac. & G. 389; 19 L. J. (Ch.)

(3) 11 C. B. 775; 21 L. J. (C.P.) 23. 410.

and that parties contracting with them must be supposed to know it." And Martin, B., speaking of the *East Anglian Case* (1), and the *Dover and Deal Case* (2), said (3), "They must be taken to govern all the courts in Westminster Hall." I think that the statutes by which the defendants were incorporated did constitute them a company created for particular purposes, with special powers, and that the application of the funds to be raised under them is limited to prescribed and definite objects; and that, by reasonable inference from the provisions of the statutes, the bargain now under consideration is prohibited, and that its performance by the defendants would amount, not merely to a breach of trust, the remedy for which would be in equity, but that the contract itself being ultra vires and illegal, because prohibited, the defence is properly raised in a court of law. However we may regret to give effect to the repudiation of a bargain entered into by the directors of a company, we cannot fail to see that the directors of railway companies often, I fear, through indirect motives, do enter into contracts and engagements most ruinous to the interests of shareholders, who may have been led into a false security by the very limitations of the authority expressed or impliedly contained in the acts of incorporation. Considering the present case to fall within the principle and reasoning to be found in decisions of the highest authority, and which, so far as I am aware, have never been impugned by the judgment of any court, I am compelled to come to the conclusion that the judgment of the Court below must be reversed.

Willes, J., read the judgment of

BLACKBURN, J. This is an action brought upon a covenant under the seal of the defendants, by which they bound themselves, in the event of a bill then pending in parliament being passed into an act, to pay to the plaintiff within the space of three months next after the passing of the bill, the sum of 2000*l*.

The pleas set out the agreement in hæc verba. [The learned

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(1) 11 C. B. 775; 21 L. J. (C.P.) 23.

(2) 18 Q. B. 618; 22 L. J. (Q.B.) 69.

(3) 9 Ex. at p. 73; 22 L. J. (Ex.) at p. 307.

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judge stated the agreement down to the third article, and proceeded.] Then follow other stipulations as to the expenses of making out the title and the purchase of other lands if required, which it is unnecessary to notice further than to say, that they would not become operative unless some portion of the plaintiff's land was taken; and by the last stipulation—17—it is agreed that this agreement shall be void if the company fails to obtain an act in the present session of parliament, authorizing the construction of the said intended railway, or of any railway, through any part of the estate of Sir Charles Taylor.

The first plea then proceeds to aver that the defendants have not taken, or given notice to take, any part of the plaintiff's land for the purpose of making the line; and the second plea, that the plaintiff did not sustain any annoyance, &c., as mentioned in the third stipulation.

To each plea there is a demurrer.

The Court of Exchequer gave judgment for the plaintiff, on which error has been brought.

The case was argued in the sittings after last Hilary Term, before my Brothers Willes, Keating, Mellor, Montague Smith, Lush, and myself, when the Court took time to consider.

It is plain that the special averments in the pleas do not affect the question, for the stipulation is that the money should be paid within three months after the passing of the act which conferred on the company the power to make the line through the plaintiff's land and to cause annoyance and inconvenience; and it was clearly not intended that the payment was to be delayed till that power was actually exercised, and this was not disputed on the argument. But Mr. Mellish, who argued for the defendants, contended that the agreement was not one that could be enforced. After the decision of the Court of Exchequer Chamber and the House of Lords in *Simpson v. Lord Howden* (1), it was not open to him to contend that the agreement was in itself illegal, or that it might not have been enforced against any private persons, who, being promoters of a railway bill, had executed a deed containing similar stipulations on their part; but he relied on the fact that the defendants were a railway company, who, at the time they executed the deed,

(1) 10 A. & E. 793; 9 Cl. & F. 61.

were incorporated by the Chichester and Midhurst Railway Act, 1864 (27 & 28 Vict. c. lxxv), a public act: that the act which they did obtain after the making of the agreement (the Chichester and Midhurst Railway Extension Act, 1865, 28 & 29 Vict. c. cccliv) was also a public act, that the latter act contained no provision relating to this agreement, or sanctioning it; and that both contained the clauses usual in such acts, appropriating the capital authorized to be raised for the purposes of the acts. And he argued that such an agreement as this was an agreement to appropriate 2000*l.*, part of the funds to be raised under one or other of these acts, to a purpose not sanctioned by either of them, and consequently was void, as being what is commonly called *ultra vires*. On this point, which is no doubt one of difficulty, we had the advantage of hearing an able argument by Mr. Mellish for the defendants, and Mr. Manisty for the plaintiff; and, after consideration, I have come to the conclusion that the judgment below in favour of the plaintiff was right, and should be affirmed.

I must first observe that this question is raised on a record in which there is no averment of fraud or deception of any kind, and we must therefore proceed on the assumption that the transaction was *bonâ fide*, and really what it is represented on the agreement to be; and this at once distinguishes the case from that of *Earl of Shrewsbury v. North Staffordshire Railway Company* (1), where Vice Chancellor Kindersley came to the conclusion (stated in his judgment (2)), that the agreement was not what it professed to be, and was in no way connected with the injury to the land, but was simply a bargain to give Lord Shrewsbury 20,000*l.* merely for his countenance and support.

And it is also to be observed that, even so construing the agreement, the Vice Chancellor thought that the question did not arise before him whether such an agreement was *ultra vires* in the sense that it was prohibited by the railway acts; but that the agreement having been made with the individual promoters before they were incorporated, the question was, whether it was *ultra vires* in the sense that the directors (after incorporation) could not bind all the shareholders to submit to it. As reported in the Law Reports,

(1) Law Rep. 1 Eq. 593; 35 L. J. (Ch.) 156.

(2) Law Rep. 1 Eq. at p. 612.

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the Vice Chancellor says (1): "I am of opinion that neither a resolution of a board of directors, nor the vote of the majority of shareholders at a general meeting, could authorize the application of any portion of the funds of the company to the purchase of such countenance and support, *even as against a single dissentient shareholder*. Such an application of the funds of the company would be clearly *ultra vires*." In the report in the Law Journal he is made to point out the distinction more explicitly (2): "When you speak of *ultra vires* of the company, you mean one or other of two things, either that you cannot bind all the shareholders to submit to it, or that it is *ultra vires* in this respect, that the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbour. But in the present case *the latter question does not arise*. The question is, *whether it is ultra vires as being beyond the power of the directors to bind all the shareholders*." I think the distinction which the Vice Chancellor here takes is a just and a very important one; and as I think it goes far to decide the present case, I shall examine it more at length.

The legislature, in passing special acts by which railway and other trading companies are incorporated, have in view two distinct purposes. They incorporate a body of shareholders who seek as a trading speculation to carry out a particular scheme for their own benefit, and they at the same time, being satisfied that the scheme will be for the benefit of the public, confer on the body thus incorporated certain privileges, and impose on them certain restrictions, for the benefit of the public.

As the shareholders are in substance partners in a trading concern the management of which is committed to the body corporate, a trust is by implication created in favour of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of carrying out the original speculation. The rights thus conferred on the shareholders, as between them and the corporation, are very analogous to those between partners *inter se*, and like those, depend upon the terms on which the parties entered on the joint speculation. Any shareholder has a right to object to any act being done which is in contravention of the rights thus given to him. Though the majority of the

(1) Law Rep. 1 Eq. at p. 618.

(2) 35 L. J. (Ch.) at p. 172.

shareholders, or even all but himself approve, yet he has a right to object to the making or the enforcing of any contract to do any unauthorized act which would affect his individual interest.

But the shareholder may waive any right which is given to him for his own protection only; and if he has either expressly or tacitly done so, he can no longer object; and neither a stranger, nor the body corporate itself, can raise such an objection to a contract made by the corporation, if no shareholders choose to raise it for themselves.

But the legislature, with a view to public policy, does, sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated, and when an act is thus made *malum prohibitum*, any contract to do it is illegal; and if there is an attempt made to enforce such a contract, the defendant, whether a company or an individual, may, if his conscience permit him, set up the illegality to which he was a party; for in *pari delicto potior est conditio defendentis*. Though every shareholder in the company had assented to the making of a particular contract, yet if the legislature have, not merely for the protection of the shareholders, but for the good of the public, forbidden the making of it, it is illegal, and the corporation whose shareholders have all assented is in no worse position for raising the defence than the chairman of the company who has personally entered into the contract, and yet may, as was decided in *Macgregor v. Dover and Deal Railway Company* (1), set up the provisions of the railway acts as making his personal contract illegal.

The question whether a particular thing is thus prohibited by the statutes must in every case depend upon the true construction of them.

I think it very unfortunate that the same phrase of "*ultra vires*" has been used to express both an excess of authority, as against the shareholders, and the doing of an act illegal as being *malum prohibitum*: for the two things are substantially different; and I think the use of the same phrase for both has produced confusion. When the objection to a particular contract is that it may affect the interest of the shareholders, the objection can be raised by them in a court of equity, as is very clearly pointed out by

(1) 18 Q. B. 618; 22 L. J. (Q.B.) 69.

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Vice Chancellor Wood in *Maunsell v. Midland Great Western of Ireland Railway Company*. (1) He says: "With regard to the question which is now raised, and which has been so ably discussed, I must consider the exact position in which the plaintiffs stand. They are not the Midland Company coming here, as has been suggested in the course of the argument, seeking to set aside their own agreement, but they are certain shareholders who, finding the common seal of their company attached to a document by which they conceive that they are affected in a manner in which their directors are not authorized to affect them, come here for a very ordinary equity, namely, to be relieved from the consequences of such an improper use of the common seal. This is an entirely different position, of course, from that in which the company themselves would stand, if they came here to be relieved from the consequences of their own act."

I think that any objection made only on the ground that it affects the interest of a shareholder, can only be made by or on behalf of the shareholders, and therefore cannot be made in a court of law at all, but must, if raised at all, be raised in a court of equity. It might perhaps be enough to say that on this record there is no allegation that there is any shareholder who did not acquiesce in the promoting of this bill; but I think no such allegation would have made the pleas good at law, as the objection would concern no one but the shareholder, who is not and cannot be a party to the action at law, and I think it important to point this out. For in my opinion it is not a mere technical distinction, whether such an objection must be raised in a court of equity or in a court of law. It is a difference, not merely of the form in which the issue shall be raised, but of what the substance of that issue shall be. The seemingly technical point raises the question whether the smallest excess of authority renders the whole contract illegal, and so entitles those who have the management of the corporation (and who, therefore, presumably were as individuals consenting parties to the contract) to repudiate the contract in the name of the company, however long it has been acquiesced in, and however seriously the position of the plaintiff has been altered in consequence of that acquiescence; or whether the objection should

be held to lie only in the mouth of those shareholders, who were not consenting parties to the contract sought to be set aside, or have not by laches or otherwise rendered it inequitable in them to set it aside. It is obvious that an adherence to this distinction will prevent those scandalous cases which have rendered the word repudiation a term of opprobrium.

But it was contended on the part of the defendants that the legislature have, for reasons of public policy, expressly or by necessary implication, forbidden railway companies to make any application of their funds which a dissentient shareholder could stop, and so rendered it *malum prohibitum*; and therefore any contract to perform any act involving such an expenditure is illegal; or at all events that it has forbidden such an expenditure; and if either position is correct, no doubt a court of law has no power or right to inquire into the expediency of the legislation which has rendered that contract illegal. Any defendant who is sued on an illegal contract may shew the illegality, and then the Court has but one duty, and that is to refuse to enforce the illegal contract. But I do not agree in either position.

The case of the *East Anglian Railway Company v. Eastern Counties Railway Company* (1) was much and properly relied on by the counsel for the defendants. There the question before the Court of Common Pleas was as to the validity at law of an agreement under seal between four railway companies, to the effect that three of them, which were ultimately incorporated into and formed the East Anglian Railway Company, should prosecute in their own names bills for forming railways; that the defendants, the Eastern Counties Railway Company, should take a lease of the railways when made for 999 years; that the defendants should furnish all capital necessary for completing the railways, should have the control of the proceedings before the committees, and should pay all the costs of those proceedings. The Court decided that this agreement was illegal, and forbidden by the statutes under which the defendants, the Eastern Counties Railway Company, were authorized to raise their capital and required to apply it to the making and maintaining of the Eastern Counties Railway. The Court acted on the principle that the power to raise funds for

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(1) 11 C. B. 775, 811; 21 L. J. (C.P.) 23, 27.

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a particular concern, and the enactments directing them to be applied for that purpose, were for the public purpose of procuring that concern to be carried out, and that any application of the funds to any other purpose was forbidden and illegal. And they seem to treat the question exactly as if the plaintiff had been suing an ordinary common-law partnership, and the question was as to the authority of the body corporate to bind each of the individual parties, and conclude by saying: "We are therefore bound to say that any contract relating to such bills (those promoted by the East Anglian Company) is not justified by the act of parliament, is not within the scope of the authority of the company as a corporation, and is therefore void." And I do not deny that it may properly be inferred from that language, that those who concurred in that judgment thought that everything not expressly or impliedly authorized as against the shareholders was forbidden as against public policy, and void.

This case was followed by that of *Macgregor v. Dover and Deal Railway Company* (1), where a declaration, which alleged that the plaintiff in error (defendant below), Macgregor, being chairman of the South Eastern Railway Company, had promised that his railway company should guarantee the defendants in error against the costs of a bill which they promoted, was held by the Court of Exchequer Chamber to be bad in arrest of judgment, as it was "a contract by which the defendant is to bind the company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public act of parliament."

This case was not overruled by the decision of the House of Lords in *Eastern Counties Railway Company v. Hawkes* (2); indeed, it was in terms declared to be untouched by that decision, though I think it will be found to be much restricted by it; and being the decision of the Court of Exchequer Chamber, it is binding on us when sitting in this Court. I think, therefore, we are bound to hold, not merely that a contract to do an act forbidden by a public statute as contrary to public policy, is illegal and void—a doctrine in which I completely concur—but also that the provisions relating to the appropriation of the capital to the purpose of the statutes

(1) 18 Q. B. 618; 22 L. J. (Q.B.) 69.

(2) 5 H. L. C. 331.

authorizing it to be raised, are not merely for the benefit of the shareholders, which, therefore, they may waive, but are for the public benefit, making an appropriation of the funds to other purposes, such as those in the contract then before the Court of Exchequer Chamber, *malum prohibitum*. Erle, J., in *Mayor of Norwich v. Norfolk Railway Company* (1), impugns this decision with great force of reasoning; and if I were now advising the House of Lords, I should wish to reconsider the point. But as the decision of *Macgregor v. Dover and Deal Railway Company* (2) was in the Exchequer Chamber, and has never been reversed, I think we are bound to follow it as far as it goes. But I do not think that the position to be inferred from the language of the judgment in the *East Anglian Railway Company v. Eastern Counties Railway Company* (3), that every appropriation of the funds that is not so far authorized by the statutes as to be binding on a dissenting minority of shareholders, is therefore forbidden and illegal, is at all part of the decision of the Court of error so as to be binding on us. I think, moreover, it is wrong, and that, if it were part of the decision, it has been departed from in subsequent cases.

In *South Yorkshire Railway Company v. Great Northern Railway Company* (4), which occurred directly afterwards, Lord Wensleydale (then Baron Parke) says: "Generally speaking, all corporations are bound by a covenant under their corporate seal properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of a partnership to bind the other, and constitute a branch of the law of principal and agent. In partnerships, where all the members do not concur in the contract (and it is often that they do not), one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, not the other partners. But

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(1) 4 E. & B. at p. 412; 24 L. J. (Q.B.) at p. 111.

(2) 18 Q. B. 618; 22 L. J. (Q.B.) 69.

(3) 11 C. B. 775; 21 L. J. (C.P.) 23.

(4) 9 Ex. 55, 84; 22 L. J. (Ex.) 305, 313.

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corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an act of parliament for particular purposes with special powers, then, indeed, another question arises. Their deed, though under their corporate seal and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the legislature meant that such a deed should not be made.”

This is very different from the doctrine which might be inferred from the expressions used in the judgment in the *East Anglian Railway Company v. Eastern Counties Railway Company* (1), viz. that all acts not so authorized by the legislature as to be binding on dissentient shareholders are void, as not being “within the scope of the authority of the company as a corporation.” Lord Wensleydale’s mode of stating the proposition has been adopted, as expressing the true doctrine, by the Court of Queen’s Bench, in *Chambers v. Manchester and Milford Railway Company* (2); by the Court of Common Pleas in *South Wales Railway Company v. Redmond* (3); by the Court of Exchequer in *Bateman v. Mayor &c. of Ashton-under-Lyne* (4); by Lord Cranworth, C., in delivering the judgment in the House of Lords in *Shrewsbury and Birmingham Railway Company v. North Western Railway Company* (5); and I think, therefore, we are entitled to consider the question to be, not whether the present defendants had, by virtue of their acts of incorporation, authority to make the contract, but whether they are by those statutes forbidden to make it. And I think that the cases subsequent to that of the *East Anglian Railway Company v. Eastern Counties Railway Company* (6), and more particularly that of *Eastern Counties Railway Company*

(1) 11 C. B. at pp. 813–14; 21 L. J. (C.P.) at p. 26.

(2) 5 B. & S. 588; 33 L. J. (Q.B.) 268.

(3) 10 C. B. (N.S.) 675.

(4) 3 H. & N. 323; 27 L. J. (Ex.) 458.

(5) 6 H. L. C. 113, at p. 136; 26 L. J. (Ch.) at p. 493.

(6) 11 C. B. 775; 21 L. J. (C.P.) 23.

v. *Hawkes* (1), shew that the present contract (assuming it to be really what it purports to be) is not forbidden, and consequently is legal as against the corporation, though a shareholder (if there be one), who did not acquiesce in the promotion of this bill and the making of such contract by the directors, may, perhaps, have a right in equity to have the contract cancelled.

The first objection to the contract is, that the defendants were not, by the Chichester and Midhurst Railway Act, 1864, authorized to promote a bill for an extension. And they certainly were not so authorized as against their shareholders. It is said by Lord Campbell, in delivering his opinion in *Eastern Counties Railway Company v. Hawkes* (2), "The shareholders of the company might, if they pleased, object to their funds being applied to defraying the expense of soliciting the bill; but if they remain quiet, it may be fairly inferred that they all approve of the extension; and when the bill to authorize the extension has received the royal assent, no shareholder can any longer complain." But even if the bill had been rejected, there would not have been anything illegal in paying the costs of the fruitless application. This was the decision of the majority of the Court of Exchequer in *Bateman v. Mayor of Ashton-under-Lyne*. (3) In that case, a contract by a waterworks corporation, to pay for work done to enable them to promote a bill for an extension of their powers, was held not to be forbidden by their act of incorporation, and was therefore binding at law. And of this decision I entirely approve.

Indeed, considering how very many bills have been promoted by railway and other companies without the legislature ever objecting to entertain them, and what very large sums have been paid for the costs of such applications when they have not been successful, the position, that all such applications were forbidden by the legislature as against public policy, and that all such payments were illegal, would be very startling. I think it would logically follow, from the reasoning in *East Anglian Railway Company v. Eastern Counties Railway Company* (4); but I think it is in the nature of a *reductio ad absurdum*.

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(1) 5 H. L. C. 331.

(3) 3 H. & N. 323; 27 L. J. (Ex.) 458.

(2) 5 H. L. C. at p. 357.

(4) 11 C. B. 775; 21 L. J. (C.P.) 23.

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In the *South Wales Railway Company v. Redmond* (1), the defendant, having entered into and broken a contract to run a steam vessel in connection with the trains of the plaintiffs railway, set up the alleged illegality of the contract, as being ultra vires of the plaintiffs. But the Court held that the objection only applied where, as Erle, C.J., said, "the object to be effected was something *wholly unconnected* with the purposes of the incorporation;" or, as Williams, J., more cautiously said, did not apply where the contract, and what was to be done under it, "was directly connected with the working of the railway and the objects of its extension." This is in accordance with *Bateman v. Mayor of Ashton-under-Lyne*. (2) I apprehend that in either case a shareholder who had come promptly to a Court of equity might have obtained an injunction, on the ground that the contracts, though not forbidden as against public policy, were not authorized as against the private speculators.

It was further urged—and I think this was the objection mainly relied on—that at all events the agreement sued on was one to buy off the plaintiff's opposition, by giving more than the value of his land taken, and also a sum of money in addition, which it was obviously intended should be given to the plaintiff personally, and that, it was said, at all events, was ultra vires. But this objection is, I think, completely met by the decision of *Eastern Counties Railway Company v. Hawkes* (3), which, being a decision in the House of Lords, is binding on us, and seems to me precisely in point. There the company promoted a bill for the purpose of obtaining powers to make a line which would pass near Hawkes's house, and through part of his property. By an agreement under the seal of the company, reciting that Hawkes had opposed the passing of the bill, but had consented to withdraw his opposition upon the company entering into the agreement thereafter contained, it was agreed that, in the event of the bill passing into a law, the company would purchase the whole of Hawkes's lands for 8000*l.*, to be paid by the company within eighteen months after the passing of such bill as aforesaid, and further, would at

(1) 10 C. B. (N.S.) 675, 685, 686.

(2) 3 H. & N. 323; 27 L. J. (Ex.) 458.

(3) 5 H. L. C. 331.

the same time pay 5000*l.* as a compensation for the personal annoyance and inconvenience of compulsory eviction from his residence. The company abandoned their line, and never required any portion of his land; yet the House of Lords decreed the specific performance of the agreement, and the payment of the whole 13,000*l.*

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The object in separating the 5000*l.* from the 8000*l.* was avowedly because Mr. Hawkes was only tenant for life of the land, and it was intended that he should have that to himself personally. Probably, in the present case, the provision as to the 2000*l.* is divided from the other stipulations for the same reason. But be that as it may, I cannot see what distinction can be made which would render the covenant to pay the now plaintiff 2000*l.* within three calendar months after the passing of the present act illegal, and yet leave the covenant to pay Mr. Hawkes 5000*l.* within eighteen months of the passing of that act valid. In both agreements the obvious intention of the company was to buy off the opposition of a landowner, by giving him, in addition to the value which he would obtain for his land, a sum of money for his personal benefit. The legislature have not thought fit, in express terms, to prohibit a contract for this additional payment. According to the construction put in *Pole v. Pole* (1) on the 73rd section of the Lands Clauses Consolidation Act, 1845, they have made the recipient (if a tenant for life) trustee for the remainderman; a provision which certainly seems to me to negative any implied prohibition of such a contract.

It was also objected that the money was to be paid within three months after a bill enabling a company to take the plaintiff's land should become law, and that, therefore, the money would be payable even though the defendants should abandon their line, and never touch the plaintiff's land at all; and in support of this objection, counsel cited the statement in the judgment of the Court of Queen's Bench in *Gage v. Newmarket Railway Company* (2), that if the covenant before them had been to that effect they would have held it illegal, and the strong dictum of Lord Cranworth, in *Preston v. Liverpool &c. Railway Company* (3), that

(1) 2 Dr. & Sm. 420; 34 L. J. (Ch.) 586.

(2) 18 Q. B. 457; 21 L. J. (Q.B.) 398.

(3) 5 H. L. C. at p. 622.

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even if the Court of Queen's Bench had stated nothing of the sort he should have had no possible doubt that it was *ultra vires*.

These are, no doubt, authorities to be treated with much deference; but it seems to me that they are completely inconsistent with the decision in *Eastern Counties Railway Company v. Hawkes*. (1) As Lord Cranworth was a party to the decision in that case, what he says in *Preston v. Liverpool &c. Railway Company* (2) must have been intended to be qualified by him in some way so as to make it not inconsistent with that decision; perhaps he meant to confine his observation to a case in which it could be made to appear that the payment of the money was to be wholly unconnected with the power to take the land, and was really to be only to purchase the countenance and support of a great man: as Kindersley, V.C., afterwards construed the contract in *Earl of Shrewsbury v. North Staffordshire Railway Company* (3); but as the dictum stands in the report it does not seem so limited. In *Eastern Counties Railway Company v. Hawkes* (1) the railway company had bound themselves, in consideration of Mr. Hawkes withdrawing his opposition, that within eighteen months of the passing of the act they should purchase the plaintiff's estate for 8000*l.*, and pay him the further sum of 5000*l.* for his compulsory eviction from it. The railway company never made the line, never took the plaintiff's land, and within the eighteen months gave him notice that they did not want his land, and his eviction was in consequence of his insisting on compelling them to adhere to their bargain. Lord St. Leonards, in his opinion in the House of Lords, when dealing with another point, says (4): "Where directors are acting in the obvious line of duty, as in this case, *buying off an opposition* and acquiring property, &c.;" and it certainly is very difficult to understand how the plaintiff could, by putting in a stipulation enabling him to force the railway company to take his land which was not wanted for the line which they had abandoned, make the contract valid, if without such stipulation it was illegal. I own I think that the effect of the decision of *Eastern Counties Railway Company v. Hawkes* (1) is to establish, that though the shareholders may, if they take proper steps in proper time, stop their

(1) 5 H. L. C. 331.

(2) 5 H. L. C. at p. 622.

(3) Law Rep. 1 Eq. 593.

(4) 5 H. L. C. at p. 371.

directors from promoting a bill for an extension, yet that the legislature has not made the soliciting such a bill, or the making ordinary contracts for the purpose, illegal and *mala prohibita* because the promoter is a railway company. I think that decision does not overrule the decision in *East Anglian Railway Company, v. Eastern Counties Railway Company* (1), and in *Macgregor v. Dover and Deal Railway Company* (2), that contracts involving the application of the funds of railway companies to purposes foreign to those for which they are incorporated, are illegal as being forbidden by the legislature on grounds of public policy; but I think it restricts the application of that doctrine to cases where the purpose is foreign to, and clearly unconnected with, that for which the company was incorporated. The effect of this and some other decisions of the House of Lords is stated by Lord St. Leonards in the end of his judgment to be, "to place the powers and liabilities of directors and their companies in making contracts, and in dealing with third parties, upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purpose for which they were established; but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot clearly be shewn not to fall within them." (3)

If any shareholder in the present company has never been a party to treating the promotion of the bill for the extension line and the bargaining with the proprietors along it to withdraw their opposition as within the object of their act, nothing I have said is meant to prejudice his trying, in a court of equity, to set aside the agreement; but I think that we cannot hold the corporation entitled to treat it as illegal and void without overruling *Eastern Counties Railway Company v. Hawkes*. (4)

I think, therefore, that the judgment below should be affirmed.

WILLES, J. I am of the same opinion. I agree generally in the judgment of my Brother Blackburn, but with great reserve so far as relates to the statement in his judgment, that the share-

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(3) 5 H. L. C. at pp. 381-2.

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holders could have any relief in equity against such a contract. I am by no means satisfied that they could. It is no part of my duty to look into that point; but I entirely agree with my Brother Blackburn, that if there be anything contrary to the duty of the directors in having put the corporate seal to the contract in this case, it amounts to a breach of trust only, and a breach of trust in respect of matters which may affect the shareholders only. There may be a sufficient surplus over and above all expenses to pay the shareholders; they may, consistently with these pleadings, have all joined and agreed, and been parties to the putting of the corporate seal. And even if it appear in a court of law that the directors have signed an agreement in breach of a trust not of a public nature (and I take it the trust for the shareholders is not of a public nature), the Court must enforce it, subject to the interference of the Court of Chancery: *Warwick v. Richardson* (1); *Lord Newborough v. Schröder*. (2)

I desire also to add to the cases which have been referred to by my Brother Blackburn, the case of *Scottish North Eastern Railway Company v. Stewart* (3), which he has not noticed in his judgment, and which I have seen the importance of too late to communicate with him upon it. Having recently looked over this case it appears to me to have a more direct bearing on the present than probably any of us supposed whilst the judgments were being prepared. There an agreement, very similar to that now sued upon, was entered into between Sir William Stewart and the Scottish North Eastern Railway Company. A branch railway was to be made (just as here there was to be an extension to form a junction), and the agreement (probably made for the purpose of inducing him not to oppose) was, that the company should, before breaking ground, pay to Sir W. Stewart, for "personal inconvenience and annoyance, which would of necessity arise to him during the formation of the line through his grounds and preserves," such a sum as a named person should determine. Then his lands were to be purchased, if the lands were taken. There was a proceeding in the court of session in the nature of a claim

(1) 10 M. & W. 284.

(2) 7 C. B. 342; 18 L. J. (C.P.) 200.

(3) 3 Macq. 382.

for specific performance, and the Court of session made a decree accordingly.

There was an appeal to the House of Lords, and they reversed that judgment, on the ground that the company had done nothing, and had taken no steps towards breaking ground or taking land; and that upon the true construction of the agreement the compensation for personal annoyance, &c., was only to be paid in the event of the land being taken. Upon that ground the decree of the Court of session was reversed, and upon that ground only, as I read the report. But in the course of that case many points were discussed which have arisen in the present case, and I think the opinions of Lord Wensleydale and Lord Cranworth in particular are very important. The learned lords, Lord Wensleydale in particular, with a view to future litigation, went on to say what they supposed would be the effect of the agreement in an action for damages; and the head-note gives very clearly the result of the statements of those noble and learned lords upon this point. That case appears to me precisely analogous to the present, with the exception that there the agreement was to pay the stipulated sum "before breaking ground," here "within three months after the bill shall have passed." Lord Wensleydale there repeats, and I think in somewhat more distinct terms, what he had laid down with reference to the power of a statutory corporation, and with respect to the burden being upon those who say that a contract of such a corporation under its corporate seal is not valid. To establish that assertion, he says (1): "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is created or regulated expressly or by *necessary* implication *prohibit* such contract between the parties. *Primâ facie* all its contracts are valid, and it lies upon those who impeach any contract to make out that it is avoided." He proceeds to consider first of all the question, whether there could be an action upon the contract whereby the company had beforehand agreed with Sir William as to the price that they should pay for his land; and what does he say as to that? "No objection can, I think, be made on the *ultra vires* doctrine to a

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(1) 3 Macq. at p. 415.

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contract by a company, who wish to alter one of the branches of its railroad" (that is, to the same effect as was intended by the act of 1865 in this case), "and are about to apply to parliament for authority to do so, engaging to purchase land from a neighbouring proprietor if they should obtain their act." Lord Wensleydale expresses at large a decided opinion with reference to the contract to purchase land: he says that it was valid. He went on to consider the contract to make personal compensation; and as to that he points out there was a difficulty, because the plaintiff was only a life renter, and there was a clause in the Scotch act requiring that any moneys paid to life renters by a railway company should be invested in a particular manner; therefore he suggested that probably that part of the contract could not be enforced in that particular case, because it *was* against the directions of that particular clause of the act of parliament. But he does not in the least suggest that it would not—on the contrary, his opinion seems to be quite clear that it would have been—a good agreement, but for that difficulty arising out of the express prohibition of the act.

The only distinction I can see between that case and the present is with regard to the three months. But suppose you may want land, and can get it by paying down a sum of money three months hence, on better terms and with greater advantage than could be obtained by making such a payment at the period when the land is actually to be taken or injured; under such circumstances, I cannot understand—I was about to say it astounds me to learn—that a person who has a legal right and capacity to purchase the thing when he wants it, cannot provide beforehand what he has to pay, and pay it down, simply because, though expecting he will want it, and being determined to have it, it is just possible that he may not want it when the time to take it comes. That is a sort of leading-string that I cannot find any trace of in the act of parliament which constitutes the company.

I should mention that Lord Cranworth (1) laid down very distinctly the doctrine, which my Brother Blackburn discussed with reference to *Eastern Counties Railway Company v. Hawkes* (2), namely, that what he calls a "bribe" (that is, an agreement to give a certain sum of money as a bribe to buy off opposition to

(1) 3 Macq. at p. 408.

(2) 5 H. L. C. 331.

a railway bill in parliament) cannot be enforced. But he explains away that view, I think, very much in the same way as my Brother Blackburn explains it in his judgment, by saying that in that particular case he thought there was nothing at all to shew that it was a bribe to Sir W. Stewart, but rather a payment; and that payment, it appears to me, stands in all respects on the same footing as that which was to be paid to Sir Charles Taylor in the present case.

Therefore, without saying that I assent to all the conclusions of my Brother Blackburn, especially with regard to what the Court of Chancery would do, which is a question I do not think it necessary to enter upon, I am clearly of opinion that this agreement was not ultra vires of the company, and that upon the passing of the act of parliament it became perfectly valid. I would notice, as, in my opinion, a matter of extreme importance in this agreement, and as bringing it entirely within the fair scope of what the company might do, that there was a proviso that the agreement was to be void if the act of parliament was not obtained.

I must therefore concur with the judgment of my Brother Blackburn; but, as the majority of the Court are of a different opinion, the judgment must be in accordance therewith, namely, that the judgment of the Court of Exchequer be reversed.

Judgment reversed.

Attorneys for plaintiff: *Rogerson & Ford.*

Attorneys for defendants: *Faithfull, Son, & Coode.*

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Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Debtor and Creditor—Deed of Assignment—Unreasonableness—Trustees' Discretion—Charging Expenses of obtaining Creditors' Assents on Estate.

A deed under the Bankruptcy Act, 1861, s. 192, whereby the debtor assigned his whole property to trustees for the benefit of his creditors, contained the following amongst other clauses:—1, a clause charging his property in the trustees' hands primarily with the expenses of obtaining the creditors' assents to the deed; and 2, a clause empowering the trustees from time to time to determine the dividends payable to the creditors, and to pay the same "at such place and in such manner as they should think fit:"—

Held, that both these provisions were reasonable.

DECLARATION. 1st count, on a bill of exchange, by the drawer against the acceptor; 2nd count, for money lent and for money due on accounts stated.

Plea, setting out verbatim a deed under s. 192 of the Bankruptcy Act, 1861, entered into between the defendant of the first part, two trustees of the second part, and all the creditors of the defendant who would be entitled to prove in bankruptcy, of the third part, whereby the defendant absolutely assigned the whole of his property and estate of whatever kind to the trustees, on various trusts, for the benefit of his creditors; and whereby it was provided, amongst other things, 1, that the estate in the trustees' hands should be charged primarily with the expenses of investigating the defendant's affairs, of preparing, executing, stamping, and registering the deed, and of *procuring the signatures or assents of the creditors thereto*; and 2, that the trustees should be empowered "from time to time to determine the amount of dividend which should from time to time be declared and paid out of the moneys in hand to and among the said creditors, in respect of their respective debts, and to pay such dividends *at such place and in such manner as they should think fit.*" Averment of performance of all conditions necessary to make the deed as binding on all the creditors of the defendant, including the plaintiff, as though they had executed it.

Demurrer and joinder.

Quain, Q.C., in support of the demurrer. First, it is unreasonable to charge the expenses of obtaining the creditors' assents upon the funds which would otherwise be available for distribution without deduction. The effect of such a provision may possibly be to swallow up the whole estate.

[*MARTIN, B.* The debtor by this deed has stripped himself of his whole property. That being so, I see nothing unreasonable in the clause objected to.]

It is too extensive in its operation. Secondly, the discretion vested in the trustees is too large. Not only are they to determine the amount of dividend, but they may pay it to each creditor whenever and wherever they please. They might choose, for example, to insist on paying an English creditor in New York.

[*KELLY, C.B.* We ought to assume that the trustees chosen are persons in whom the creditors have just ground for confidence, and that they will discharge their duties with propriety and discretion.]

Cóleridge, Q.C. (*H. James* with him), *contra*, was not called upon.

THE COURT (*Kelly, C.B.*, and *Martin, B.*) held both the provisions objected to to be reasonable, and gave judgment for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *Abraham.*

Attorney for defendant: *E. F. Davis.*

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June 15.

ROBERTSON v. GOSS AND ANOTHER.

*Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Deed of Assignment
—Unliquidated Demand—"Creditor."*

A deed under s. 192 of the Bankruptcy Act, 1861, does not bind one who has a claim for unliquidated damages against the debtor, and whose damages have not been assessed under s. 153.

Sharland v. Spence (Law Rep. 2 C. P. 456) followed.

DECLARATION, claiming damages for not delivering yarns.

Plea, a deed under s. 192 of the Bankruptcy Act, 1861, made between the defendants (the debtors), a trustee, and the creditors of the defendants, by which the debtors assigned all their property to the trustee for the benefit of their creditors, and the creditors released the debtors from (inter alia) all "claims and demands" for or on account of "the debts, claims, or demands" of the creditors "now due or owing from the said debtors."

Demurrer and joinder.

May 1. *Coxon*, in support of the demurrer, having cited *Hoggarth v. Taylor* (1), the Court called upon

Holker to support the plea. The case of *Hoggarth v. Taylor* (1) proceeded merely upon the words of the deed, which were not wide enough to cover unliquidated demands; but the words here are clearly large enough, if such claims can be barred at all by a composition deed as against a non-assenting creditor. That creditors with unliquidated demands are included in the term "creditor" in the Bankruptcy Act, 1861, is clearly decided by *Wood v. De Mattos* (2); and the earlier case of *Ex parte Mendel* (3), and the later case of *In re Penton* (4), agreeing with that decision, shew that s. 153 applies to the case of composition deeds, and that such creditors can come in and prove under a deed in the manner there pointed out. But, if so, they must be bound by s. 192, although they may be at liberty to pursue their remedy by action if the debtor does not choose to plead the deed, and, by doing so, may disable themselves from taking advantage of s. 153, as in

(1) Ante, p. 105.

(2) Law Rep. 1 Ex. 91.

(3) 33 L. J. (Bank.) 14.

(4) Law Rep. 1 Ch. 158.

the case of *In re Penton*. (1) This being the meaning of the word "creditor" in the act, the meaning must be taken to be the same in deeds intended to take effect under the act, unless something appears to restrain that construction. In *Hoggarth v. Taylor* (2) there was such a circumstance; for promissory notes were there to be given to all the creditors at once, as is noticed by Kelly, C.B., in his judgment (3), which implied that the sum for which they were to be given was already ascertained. But there is nothing here to raise such an inference; the word must, therefore, have its full force, and the release will discharge the debtor. He also referred to ss. 144 and 197 of the act.

Coxon, in reply. By s. 197, the bankruptcy provisions of the act are applied to creditors in case of a deed, in the same manner as if "the creditors had proved in a bankruptcy." But that section must be intended to include and bind all those who are bound as creditors under s. 192. This, therefore, shews that only those are intended to be affected by the deed who are in the same position as creditors who have proved. Now, s. 153 is not imperative; it only says "it shall be lawful for the Court" to direct the damages for the bankrupt's breach of contract to be assessed; and until this is done the party entitled to sue is not a creditor; he cannot prove his debt, nor act as creditor in the bankruptcy; and if his claim is never assessed the discharge of the bankrupt is no bar to his action, since he never could have proved under the bankruptcy. It follows, therefore, that the plaintiff here, who has never had his damages assessed, is not a "creditor," nor bound by the deed, although he might possibly have made himself so by resorting to s. 153. He also contended that the words of the deed shewed that a more restricted meaning was intended.

Our. adv. vult. (4)

June 17. The judgment of the Court (Kelly, C.B., Bramwell, Channell, and Pigott, BB.) was delivered by

KELLY, C.B. This is a demurrer to a plea. The declaration

(1) Law Rep. 1 Ch. 158.

(2) Ante, p. 105.

(3) Ante, p. 107.

(4) Between the argument and the

judgment the case of *Sharland v. Spence* (Law Rep. 2 C. P. 456) was decided.

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alleges that the defendants contracted to deliver to the plaintiff some yarns, and did not deliver them, and claims damages.

The plea is founded upon a composition deed, made according to the provisions of the Bankruptcy Act, 1861, ss. 192—198. *Wood v. De Mattos*, in the Exchequer Chamber (1), decides that a deed of this nature may provide for claims to unliquidated damages, and that persons having such claims may be creditors within these sections of the Bankruptcy Act, and may elect to come in and entitle themselves to have the amount of their demands ascertained under s. 153, and then to claim the benefit of the deed in respect of such amount; and the decision of Lord Cranworth in *In re Penton* (2) is to the same effect. But Lord Cranworth likewise held in that case that such a creditor was not bound to come in under the deed, but might sue for damages and proceed to judgment. In *Hoggarth v. Taylor* (3) it was held in this Court that such a deed is no defence to an action, where the plaintiff thinks fit to sue for unliquidated damages; and the Court of Common Pleas, upon the authority of that case, decided, in last Easter Term, in *Sharland v. Spence* (4), that such a deed cannot be set up as a defence to an action for unliquidated damages, unless the amount has been ascertained under the 153rd section, and the plaintiff has elected to take the benefit of the deed. This plea, therefore, is no answer to the action, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Attorney for plaintiff: *W. A. Holcombe.*

Attorneys for defendants: *Pritchard & Englefield.*

(1) Law Rep. 1 Ex. 91.

(2) Law Rep. 1 Ch. 158.

(3) Ante, p. 105.

(4) Law Rep. 2 C. P. 456.

PHILLIPS AND OTHERS *v.* THE COMMISSIONERS OF INLAND
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June 15.

*Stamp Act (13 & 14 Vict. c. 97), sch. tit. Conveyance—Partnership, dissolution
of—Conveyance by retiring Partner.*

On a dissolution of partnership a deed was executed, by which, after reciting that it had been agreed that the share of the retiring partner (Sir G. R. P.) in the real assets of the firm should be taken by the continuing partners, and that he should be allowed in account the sum of 17,313*l.* as an equivalent for the value of his share; the retiring partner, in consideration of the sum of 17,313*l.*, "part of the moneys and assets of the said dissolved co-partnership to the said Sir G. R. P. so allowed in account, appropriated, and paid as aforesaid," conveyed his share of the real assets to the continuing partners:—

Held, that the indenture was liable to ad valorem stamp duty, as a conveyance upon a sale within the meaning of 13 & 14 Vict. c. 97, sch. tit. Conveyance.

CASE stated under 13 & 14 Vict. c. 97, by the Commissioners of Inland Revenue, at the request of Mark Phillips and others, on appeal against their decision, requiring a certain indenture to be stamped with an ad valorem duty as a conveyance upon a sale, under 13 & 14 Vict. c. 97, and 28 & 29 Vict. c. 96, s. 1; the question for the Court being, whether the indenture was so chargeable. The indenture in question was made on the retirement from the appellants' firm of Sir George Richard Phillips, one of its members. It recited that an account had been taken of the assets and liabilities of the partnership, and of the shares of the partners; and that it had been agreed that all the share and interest of the retiring partner in the real assets of the partnership should be appropriated to and taken by the other partners; and that there should be allowed in account, and appropriated and paid to him out of the money and assets of the late co-partnership, other than real assets, the sum of 17,313*l.*, as an equivalent to the computed value of his share in the real assets. And "in consideration of the said sum of 17,313*l.*, part of the money and assets of the said dissolved co-partnership, to the said Sir G. R. Phillips so allowed in account, and appropriated and paid as aforesaid," Sir G. R. Phillips conveyed all his share in the real assets of the firm to the remaining partners. The only difference relied upon between the present deed and that adjudicated upon in *Christie*

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v. *Commissioners of Inland Revenue* (1), was, that the consideration was here expressed to be part of the partnership assets; and on this ground it was contended that, notwithstanding that case, the present deed would only be taken to be a deed of partition.

Manisty, Q.C., for the appellants, contended that both in form and substance this was only a partition.

The Solicitor General (*Sir J. B. Karlake*) (*Hannen* with him), for the Crown, was not called upon.

THE COURT (Kelly, C.B., Martin and Channell, BB.) held that the case was not distinguishable from that of *Christie v. Commissioners of Inland Revenue*. (1)

Judgment for the respondents.

Attorneys for appellants: *Williamson, Hill, & Co.*

Attorney for respondents: *Solicitor to the Commissioners of Inland Revenue.*

June 5.

REDWAY v. SWEETING.

Mutual Insurance Society—Liability of Individual Shareholder—Remedy in Case of Loss—Cross Demurrers—Right to begin.

In the Court of Exchequer, when there are cross demurrers to be argued, the party demurring first has the right to begin.

Hill v. Cowdery (1 H. & N. 360) adhered to.

The plaintiff and defendant were members of a mutual insurance society, and the defendant, with the other members of the society, were insured to the plaintiff upon his ship in a sum specified in a policy of insurance, subscribed by the defendant and the other members of the society. Annexed to the policy, and forming part of it, were the following, amongst other rules:—

The members of this association shall severally and respectively, and not jointly or in partnership, or the one for the other of them, but each only in his own name, insure each other's ships from the date of entry of each respectively until noon of the 20th of February then next, and from that time until noon of the 20th of February in the next succeeding year, and so on from year to year, against all losses, &c.

[A rule nominating managers, and providing that they should meet once a quarter to audit accounts and settle claims.]

(1) Ante, p. 46.

In order more readily to provide for the payment of claims, the managers are hereby empowered to levy contribution of one-fourth part of the fixed annual premium, which shall be drawn for [in a prescribed manner]. Provided always, that if the gross amount of losses and expenses during the year shall happen to exceed the amount of the premiums so realized, the deficiency shall be made good by an additional percentage, which the members, during the year, shall be respectively bound to contribute and pay to the managers; but should the premiums so realized exceed the losses, &c., then the surplus shall be returned in proportion to the amount of premium respectively contributed by them.

The managers' drafts on the members of the association for their proportion of the annual fixed premium, and for any additional percentage, shall be duly accepted, and punctually paid when due; and if any member shall neglect to accept any such drafts, or to pay his contributions thereto, on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in this association, and he shall thenceforth forfeit all claims in respect of any loss, &c., under his policy; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the amount due from any defaulting member shall be considered as a debt due to the managers, and shall be recoverable by them at law.

To a declaration setting out the policy and rules, and containing the usual averments of loss, &c., the defendant pleaded, first, that he had paid the percentage required of him by the managers; and secondly, that the action was commenced before the managers' drafts on him were due:—

Held, that, on the true construction of the facts and under the circumstances as they appeared on the record, the defendant was not individually liable.

DECLARATION on a policy of insurance on the ship *Orion*, and that it was mutually agreed that certain rules annexed thereto should form part of that policy; and that those rules, so far as material, were as follows:—

1. That the members of this association shall severally and respectively, and not jointly or in partnership, or the one for the other of them, but each only in his own name, insure each other's ships from noon of the 20th of February, 1865, or from the date of entry of each respectively, until noon of the 20th of February then next, and from that time until noon of the 20th February in the next succeeding year, and so on from year to year . . . against all losses &c. sustained by their respective ships . . . except as hereinafter excepted.

4. That the committee for superintending the affairs of this association do consist of the following gentlemen [here follow the names], who shall meet once a quarter, or oftener, if required, to audit the accounts and settle claims. No member of the com-

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mittee shall act as such in the settlement of his own loss or average.

5. That in order more readily to provide for the payment of claims as they may become due, the managers shall be entitled, and are hereby empowered, to levy contribution of one-fourth part of the fixed annual premium, which shall be drawn for at two months' date, from the 1st of March, June, September, and December, in each year, such premiums to form a fund for that purpose. Members entering their ships after the 20th of February shall only be charged premiums from the date of entry: Provided always, that if the gross amount of losses and expenses during the year shall happen to exceed the amount of premiums so realized, the deficiency shall be made good by an additional percentage, which the members, during the year, shall be respectively bound to contribute and pay to the managers; but should the premiums so realized exceed the losses and expenses incurred, then the surplus shall be returned in proportion to the amount of premium respectively contributed by them.

6. That the managers' drafts on the members of the association for their proportion of the annual fixed premium, and for any additional percentage, shall be duly accepted, and punctually paid when due; and if any member shall neglect or refuse to accept any such drafts, or to pay his contributions thereto on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in or by this association, and he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy or policies effected therein; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the amount due from any defaulting member shall be considered as a debt due to the managers, and be recoverable by them at law.

Averments: that, in consideration of a premium paid by the plaintiff, the members of the society severally and respectively subscribed the policy, and were insured to the plaintiff in the sum of 500*l.* on his ship, every member bearing his equal proportion; that the defendant was a member of the association and subscribed the policy; that his proportion of the said sum was 50*l.*; that the

plaintiff was interested in the subject-matter of the policy, and the same was lost, whereby the plaintiff became entitled to be paid by the defendant the sum of 50*l.*, yet the defendant has not paid the same.

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Demurrer and joinder.

Pleas—1. That the gross amount of losses in the year, in the declaration mentioned, exceeded the amount of all premiums realized, as mentioned in rule 5, by the whole amount of the sum insured by the plaintiff, of which the plaintiff had notice, and thereupon the managers called on the defendant to contribute to them such additional percentage as in rule 5 mentioned, towards making good the deficiency, and that the defendant had, in pursuance thereof, contributed the said additional percentage to the managers, in accordance with the said rules.

2. Repeating the averments in the first plea, except the averment that the defendant had contributed the said additional percentage, and instead thereof saying that the action was commenced before the drafts of the managers mentioned in rule 6 had become due.

Demurrers to both pleas and joinder.

Brown, Q.C. (*White* with him), in support of the demurrers to the pleas, was stopped at the commencement of his argument by the Court. They stated that, by their practice, where there are cross demurrers, the party demurring first is entitled to begin: see *Hill v. Cowdery*. (1)

Brown, Q.C., called attention to the circumstance that in the Courts of Queen Bench and Common Pleas the plaintiff was held entitled to begin. (2)

The Court intimated that they would adhere to their own previous rule on the subject, and accordingly called on

Mellish, Q.C. (*Beresford* with him), to support the demurrer to the declaration, and also to support the pleas. The plaintiff should have sued the managers. He had no remedy against the defendant, whose only duty was to pay the money due from him to the managers under rule 5, or to accept and meet the drafts of the managers under rule 6. To have each mutual insurer

(1) 1 H. & N. 360.

(2) See *Reg. v. Churchward*, and the

cases therein cited, Law Rep. 1 Q. B. at pp. 183, 184.

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individually liable would be contrary to the true construction of the rules, and would lead to the destruction of the association.

Brown, Q.C., contra, contended that the plaintiff was entitled to sue the defendant, and was not bound in the first instance to have recourse to the managers. Suppose the managers were to misappropriate or steal the society's funds, or were to become, from any cause, unable to pay a loss, the plaintiff would, under the rules, be able to fall back on an individual member.

Mellish, Q.C., was not called upon to reply.

KELLY, C.B. This case seems to me to be free from doubt. The plaintiff and defendant, both being members of this insurance club, have entered into the contract set forth in the declaration, and the question for us is, what that contract is. By the first rule we find that each member "insures" the ships of the others, and we must therefore inquire to what extent the defendant did "insure" the plaintiff's ship. For that purpose we have to refer to the 5th and 6th rules [the learned judge read the rules]. The defendant's liability under these rules was to give acceptances for the sums he was bound to contribute, and to pay them when due; and there is no allegation that he has failed in either respect. The first plea, indeed, shews that he has actually accepted and paid bills to the whole amount of his liabilities. The pleadings, therefore, disclose no breach of the legal contract entered into by him with the plaintiff.

It is suggested, however, that in truth the contract was to make good the insurance, in any event, to the plaintiff. That is, that supposing from any cause the managers failed to pay him, the defendant must pay. The case was put of an embezzlement or an insolvency on their part. If such a contingency were to occur, the loss would probably be considered a general loss, to be made good by an equal contribution from the several members of the society. But no question of that sort arises here. This is a simple case of an action on the policy. The defendant is liable, but it is expressly provided that he is to meet his liability in a particular way. There is no allegation that he has failed to do so, and he is therefore entitled to our judgment.

MARTIN, B. I am of the same opinion. It is contrary to the spirit and wording of the 5th rule, and to the plain intention of the parties, that one member of the society should bring an action against another, except, possibly, under some circumstances entirely different from those of the present case. The defendant is therefore, in my opinion, entitled to our judgment.

BRAMWELL, B. I am also of opinion that the defendant is entitled on these pleadings to our judgment. The allegation in the declaration is, that the defendant has not paid the sum he was bound to pay according to the tenor of the policy, and that all conditions have happened to entitle the plaintiff to recover that sum. The defendant, however, says, in reply to this allegation, "Let me have made the contract with whom I may, I have performed it." And I think that answer is a good one. Whether the plaintiff has a remedy against the managers, or the managers against the defendant, or the plaintiff, in some state of circumstances, against the defendant, I do not at present inquire. The Court of Common Pleas have now sub judice the question of whether the managers can maintain an action for these contributions. However that may be decided, I think that in this case our judgment must be for the defendant.

CHANNELL, B., concurred.

Judgment for the defendant.

Attorney for plaintiff: *Thomas Baker, jun.*

Attorney for defendant: *J. F. Elmslie.*

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June 12.

OLDIS v. ARMSTON.

Debtor and Creditor—Deed under the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192—Action by non-assenting Creditor—Unreasonable provision—Plea shewing on its face that an unreasonable provision can have no operation.

To an action by a non-assenting creditor, the debtor pleaded a deed under the Bankruptcy Act, 1861, containing an unreasonable provision. The plea averred facts shewing that at the time of the registration of the deed, the unreasonable provision could have no operation against non-assenting creditors :—

Held, a bad plea, notwithstanding the averment.

DECLARATION on the common money counts.

Plea setting out the provisions of a deed under s. 192 of the Bankruptcy Act, 1861, between the defendant (the debtor) and all his several creditors, containing a release in the usual terms, in consideration of the payment to them by him of a composition of 2s. 6d. in the pound, and the following, amongst other clauses :—
 “They, the said several creditors, do severally, and not the one for the other of them, or the acts, deeds, or defaults of the others, or any other of them (but as to secured creditors without prejudice), covenant and agree to, and with, the said debtor, his executors, &c., immediately after payment of the said composition, to hold harmless and indemnify the said debtor, his executors, &c., of and from the payment of any sum of money, costs, charges, or expenses, in or about or relating to any bill of exchange, promissory note, or other security or securities, which he may have given to them the said creditors respectively, or on account of their said several debts respectively, or any part thereof.” Averment of performance of all conditions necessary to make the deed as binding on the plaintiff as though he had been a party thereto, and that at the time of the making and registration of the said deed as aforesaid no creditor of the defendant who had not before the registration of the said deed as aforesaid, in writing assented to or approved of the said deed, and executed the same as a creditor, and no creditor of the defendant whosoever, and no person or persons whosoever, had any claim or demand against the defendant other than or save and except for a debt within the meaning and operation of the 192nd section of the Bankruptcy Act, 1861; nor had any such creditor or person, nor has he since had, nor can he

hereafter have, any claim or demand against the defendant, for or in respect of any sum of money, costs, charges, or expenses, in, about, or relating to, any bill of exchange, promissory note, or other security or securities, given by the defendant to his creditors respectively, or to any or either of them, for, or on account, or in respect, of any debt to which such deed relates; nor had nor has the defendant given to any or either of his creditors (other than to certain creditors who, before the registration of the said deed, duly assented in writing to and executed the same) any such bill of exchange, promissory note, or other security, as in the said deed mentioned.

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Demurrer and joinder.

Murphy, in support of the demurrer. The covenant to indemnify the debtor against outstanding bills, &c., is unreasonable, according to the decisions in *Woods v. Foote* (1) and *Ingelbach v. Nichols*. (2) The deed therefore is void, and cannot be pleaded in bar to an action by a non-assenting creditor; and the averment in the plea that there were no bills on which the objectionable clause could operate at the time of the registration of the deed, does not make the plea good. A deed under s. 192 of the Bankruptcy Act, 1861, must be good in itself, in order to be capable of being used as a defence.

The Court called on

Lucius Kelly, contra. First, the deed is reasonable. It is distinguishable from the cases cited, because the covenant of each creditor to indemnify, is confined to bills given to the particular creditor covenanting.

[THE COURT (Kelly, C.B., and Martin, B.) intimated that they considered the authorities cited shewed the clause to be unreasonable.]

Secondly, assuming the deed, looked at alone, to be void, the plea is nevertheless good. The averment shews that when the deed was registered the objectionable clause could have no operation on non-assenting creditors. At the time of registration none but executing creditors held bills, and non-assenting creditors therefore could by no possibility be prejudiced.

(1) 1 H. & C. 841; 32 L. J. (Ex.) 199.

(2) 14 C. B. (N.S.) 85.

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[KELLY, C.B. The effect of the averment, according to your contention, is to strike the unreasonable clause out of the deed.]

That is so. A clause which, at the date of registration, cannot operate quoad non-assenting creditors, is one to which they at any rate cannot object. In *Balden v. Pell* (1) Blackburn, J., in reference to a covenant in the deed there pleaded, which was made absolutely binding on executing creditors, whether the deed could take effect under the Bankruptcy Act, 1861, s. 192, or not, and which was represented as unreasonable, says (2): "Is that an objection in the mouth of a non-assenting creditor? What difference does it make to him if a creditor who signs takes upon himself to incur a liability?" The same question may be asked here. [He also cited *Hidson v. Barclay* (3); *Keyes v. Elkins* (4); *Johnson v. Barratt* (5); *Woods v. De Mattos* (6); *Thompson v. Knight*. (7)]

Murphy was not called upon to reply.

THE COURT (Kelly, C.B., and Martin, B.) were of opinion that a plea to an action by a non-assenting creditor, setting up as a defence a deed under the Bankruptcy Act, 1861, s. 192, containing an unreasonable clause, could not be made good by an averment of extrinsic circumstances tending to shew that the clause could not prejudice the plaintiff. They considered that a deed to be capable of being pleaded must be good in itself, and therefore held the plea bad.

Judgment for the plaintiff.

Attorneys for plaintiff: *Lumley & Lumley.*

Attorneys for defendant: *Bannister & Robinson.*

(1) 5 B. & S. 213; 33 L. J. (Q.B.) 200.

(2) 5 B. & S. at p. 228.

(3) 3 H. & C. 361; 34 L.J. (Ex.) 217.

(4) 5 B. & S. 240; 34 L. J. (C P) 25.

(5) Law Rep. 1 Ex. 65.

(6) Law Rep. 1 Ex. 91.

(7) Law Rep. 2 Ex. 42.

